

The Law of Education: Educational Rights and the Roles of Virtues, Perfectionism, and Cultural Progress

R. GEORGE WRIGHT*

I. INTRODUCTION	385
II. EDUCATION: PURPOSES, RECENT OUTCOMES, AND LEGAL MECHANISMS FOR REFORM.....	391
A. EDUCATIONAL PURPOSES AND RIGHTS LANGUAGE.....	391
B. SOME RECENT GROUNDS FOR CONCERN IN FULFILLING EDUCATIONAL PURPOSES	393
C. THE BROAD RANGE OF AVAILABLE TECHNIQUES FOR THE LEGAL REFORM OF EDUCATION	395
III. SOME LINKAGES BETWEEN EDUCATION AND THE BASIC VIRTUES, PERFECTIONISM, AND CULTURAL PROGRESS.....	397
IV. VIRTUES AND THEIR LEGITIMATE PROMOTION THROUGH THE EDUCATIONAL SYSTEM.....	401
V. PERFECTIONISM AND ITS LEGITIMATE PROMOTION THROUGH THE EDUCATIONAL SYSTEM.....	410
VI. CULTURAL PROGRESS OVER TIME AND ITS LEGITIMATE PROMOTION THROUGH THE EDUCATIONAL SYSTEM.....	417
VII. CONCLUSION: EDUCATION LAW AS RIGHTS-CENTERED AND AS THE PURSUIT OF WORTHY VALUES AND GOALS: THE EXAMPLE OF <i>HORNE v. FLORES</i>	431

I. INTRODUCTION

The law of education in the United States, at the federal and state constitutional and statutory levels, is largely a matter of rights.¹ The language

* Lawrence A. Jegen Professor of Law, Indiana University School of Law—Indianapolis. The author wishes to thank, while simultaneously entirely exculpating, Michael J. Perry and Steven D. Smith.

1. We discuss the recent *Horne v. Flores* case in this respect at some length in Part VII *infra*. See *Horne v. Flores*, 129 S. Ct. 2579 (2009). More broadly, see AMY GAJDA, *THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION* (2009). For significant educational policy cases, with implications for educational missions but typically focused on the recognition or denial of legal rights claims, see, for example, *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009) (holding that a strip search of a thirteen-year-old student for prescription pain reliever pill was an unreasonably intrusive search and seizure where no

specific reason for that form of concealment or any danger to students, though school officials granted qualified immunity); *Forest Grove Dist. v. T.A.*, 129 S. Ct. 2484 (2009) (stating that parents of a disabled child were entitled to private school tuition reimbursement from local public school district for failing to provide an adequate educational opportunity even if the child never attended public school); *Fitzgerald v. Dunstable*, 129 S. Ct. 788 (2009) (explaining that a Title IX remedy availability does not preclude bringing a § 1983 claim to enforce a plaintiff's constitutional rights as well); *Morse v. Frederick*, 551 U.S. 393 (2007) (limiting public school students' *Tinker* free speech rights in the case of advocacy of specific illegal conduct in the form of drug or alcohol consumption); *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (explaining that parents hold, and may sue independently to enforce, their rights, as distinct from their child's rights under the Individuals with Disabilities Education Act (IDEA)); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (stating that the burden of proof under the Individuals with Disabilities Education Act is on the parent challenging an Individualized Education Program); *Locke v. Davey*, 540 U.S. 712 (2004) (explaining that a statutory prohibition on state funding assistance to any student pursuing a theology degree does not violate the Free Exercise Clause); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (stating that the Family Educational Rights and Privacy Act allows for injunctive relief and possible denial of federal funds, but no private right of action to recover damages); *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002) (holding the Family Educational Rights and Privacy Act not violated by practice of student grading, and announcing scores of other students' papers); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (stating that a school may be liable for student-to-student sexual harassment under Title IX only where the harassment is severe or pervasive and the school manifests at least deliberate indifference); *United States v. Virginia*, 518 U.S. 515 (1996) (explaining the Virginia Military Institutes's (VMI) exclusion of women students violates women's equal protection rights under midlevel scrutiny); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (holding that limitations on standard individualized "probable cause" requirements are permissible where necessary to maintain appropriate order within public schools); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that purported nondenominational, officially sponsored invocation at middle school graduation was coercive and violative of establishment clause, at least absent a sufficient disclaimer); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (explaining that there is a private right of action under Title IX available for students to recover damages for sexual discrimination where educational institution receives federal funding); *Honig v. Doe*, 484 U.S. 305 (1988) (explaining that the Education For All Handicapped Children Act confers substantive educational rights); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (limiting student free speech standard to essentially a minimum scrutiny, if also perhaps viewpoint-neutral, test in the context of a school-sponsored curricular newspaper); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (explaining that public school student speech not protected where deemed lewd, vulgar, plainly offensive, or indecent and thus contrary to the school's essential mission); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (explaining that public school students' privacy rights regarding searches and seizures are subject to circumstantially and institutionally reasonable regulation); *Mueller v. Allen*, 463 U.S. 383 (1983) (explaining that state tax credit does not violate Establishment Clause where only one of many such credits, broadly available, and usable at religious schools only as the result of individual parental choice); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) (explaining requirement of free appropriate public education under IDEA as a mere "basic floor" of opportunity consistent with equal protection); *Bd. of Educ., Island Trees v. Pico*, 457 U.S. 853 (1982) (describing pervasive vulgarity or educational unsuitability, but not partisan political disagreement, as legitimate grounds for removal of book from public school library); *Plyer v. Doe*, 457 U.S. 202 (1982) (explaining denial of free public school access to undocumented immigrant children within the jurisdiction as

an equal protection violation under relatively demanding form of minimum scrutiny); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding public university's unequal denial of facility access to a religious group violative of group's freedom of speech); *Stone v. Graham*, 449 U.S. 39 (1980) (explaining official posting of Ten Commandments in public school classrooms as impermissibly religiously motivated under Establishment Clause); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding state policy requiring teachers to be citizens or to be pursuing naturalized citizenship under minimum scrutiny equal protection challenge); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (giving substantial judicial deference to expert evaluation of an advanced student's academic performance in procedural due process case); *Ingraham v. Wright*, 430 U.S. 651 (1977) (requiring limited pre-deprivation procedural due process in public school corporal punishment case); *Mount Healthy v. Doyle*, 429 U.S. 274 (1977) (holding that public school teacher in mixed motive disciplinary case must show that protected conduct was a substantial factor in the discipline; school may then show it would have imposed same discipline regardless); *Goss v. Lopez*, 419 U.S. 565 (1975) (requiring only limited due process notice and hearing rights of public school students in cases of short suspensions); *Vlandis v. Kline*, 412 U.S. 441 (1973) (rejecting state's non-rebuttable presumption of out-of-state residency for public college tuition rate purposes); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (explaining that there is no implied federal constitutional fundamental right to education or to approximate equality in public school appropriations by districts) (for commentary, see Jeffrey S. Sutton, *San Antonio Independent Community School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1985 (2008) ("While state legislatures and courts have made considerable strides in addressing the problems underlying the *Rodriguez* litigation over the last thirty-five years, no one could maintain with a straight face that they have solved them. Equity, adequacy and accountability problems remain, and there are few policy issues more deserving of attention . . . than this one.")); Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 206 n.9 (2008) ("As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right . . .") (quoting *Papasan v. Allain*, 478 U.S. 265, 285 (1986)); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972) (stating that public school teachers have no continuing property interest in a fulfilled employment contract and thus no due process right to a hearing regarding failure to rehire, but even informal mutual understandings may suffice to create a property interest sufficient to trigger a pretermination hearing regarding continuing employment); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (explaining free exercise-based limitations on the state's compelling interest in requiring school attendance to age sixteen); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (stating that free speech rights of public school students are subject to exceptions for reasonably predictable disruption, disturbance, disorder, and for violation of the rights of others); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (holding that a public school teacher's speech rights regarding employer are determined by weighing teacher's interests, as a citizen, in speaking on a matter of presumed public interest against the school's interest in efficiency, confidentiality, discipline, order, and morale); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (discussing nature, scope, and forms of academic freedom); *Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (describing an officially promoted public school prayer or Bible study as an Establishment Clause violation, though Bible reading as a curricular element for secular education reasons is permissible); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (rejecting a separate-but-equal theory of equal protection in racially segregated public school context); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (explaining free speech exemption from compelled recitation of the Pledge of Allegiance); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (validating private school alternative to public schooling); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (upholding a private school's

liberty interest in choosing to teach the German language). For a mere sampling of the cases specifically addressing the narrow issue of public school students' symbolic speech rights to wear Confederate flag-related clothing, as limited by reasonable forecasts of racial conflicts at the school, see, for example, *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734 (8th Cir. 2009); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008). *But see* *Barr v. Lafon*, 553 F.3d 463 (6th Cir. 2009) (Boggs, C.J., dissenting) (disagreeing with denial of rehearing en banc); *Scott v. Sch. Bd.*, 324 F.3d 1246 (11th Cir. 2003); *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358 (10th Cir. 2000). For a much broader and more general sampling of significant recent court of appeals cases focusing on claims of education rights, see *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199 (3d Cir. 2008) (explaining that the No Child Left Behind Act's provisions on notice and supplemental educational services do not confer a private right of action or any § 1983 remedy on students or parents); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007) (explaining that an elementary public school teacher, whose speech is "hired," has no free speech right to depart from prescribed curriculum by covering subject or advocating viewpoints extraneous thereto); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007) (holding public high school student's t-shirt message condemning homosexuality on religious grounds constitutionally unprotected as violative of the rights of others in striking at a core identifying characteristic of a minority group member); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) (exploring the boundaries between a public school's curricular mission of promoting civility and tolerance, along with compliance with statutes promoting civil rights and equality, and the free speech rights of students); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996) (implying generally reduced free speech rights for elementary school students). Finally, among the state court case law, see, merely by way of example, *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008) (explaining that California statutes permit home schooling, but are overridable in order to protect the safety of a child declared dependent, in accordance with a strict scrutiny standard); *Peter W. v. S.F. Unified Sch. Dist.*, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976) (describing literacy among students as dependent upon cultural, environmental, and physiological factors beyond the ability of the school to counteract, thereby negating negligence and causation elements in an "educational malpractice" claim); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (becoming one case among several extended lines of cases nationally marking state constitutional responsibilities, or lack thereof, regarding equality or adequacy of funding levels across school district lines); *Lewis E. v. Spagnolo*, 710 N.E.2d 798 (Ill. 1999) (describing minimal adequacy and broader quality of a public school educational or funding system as a non-justiciable legislative matter); *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (holding, by divided vote, that Massachusetts was meeting its state constitutional obligations, even to poor communities, to "cherish the interests" of the public schools); *Abbott v. Burke*, 960 A.2d 360 (N.J. 2008) (holding that the burden is on the state to show that new statutory school funding program complies with state constitutional requirement of a "thorough and efficient" education); *Campaign For Fiscal Equity v. New York*, 801 N.E.2d 326 (N.Y. 2003) (finding a sufficient prima facie causal linkage between increased school funding and compliance with a state constitutional obligation to provide a "sound basic education"); *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352 (N.Y. 1979) (noting the difficulty of determining a scope of duty or standard of care in an educator negligence or educator malpractice case); *DeRolph v. Ohio*, 780 N.E.2d 529 (Ohio 2002) (explaining that a systematic overhaul of state's school funding process is required for compliance with the state constitutional mandate of thorough and efficient common schools). For a recent assessment of state-level educational funding issues, see *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* (Martin R. West & Paul E. Peterson eds., 2007). *See also* CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* (2009).

of the law of education reflects the assertion, and then either the denial or the recognition and implementation, of rights.² The rights in question may be claimed by individuals, organizations, or broader groups.³ The rights may be of various kinds, and may be thought binding on various sorts of parties,⁴ but the language of rights-assertion pervades the law of education.⁵

The dominance of rights-talk in education law is understandable, given our rights-oriented broader legal and political culture. But there are occasional expressions of dissatisfaction with an excessive reliance on rights-talk more generally in the law.⁶ The language of the law can certainly extend beyond the scope of rights-talk.⁷ Admittedly, the potential for educational law rights reform is far from exhausted. Some education law rights reforms amount also to civil rights. Our primary aim, however, is to explore a supplementary alternative to the current emphasis on rights-assertions in the realm of education law. Our approach herein is to establish a thorough grounding for our alternative, supplementary perspective, and then to work through a specific legal case example in detail in the concluding Section VII below.

2. See authorities cited *supra* note 1.

3. See *id.*

4. For standard variations, see, for example, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); JOEL FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* (1980); HILLEL STEINER, *AN ESSAY ON RIGHTS* (1994); JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1992); JEREMY WALDRON, *THEORIES OF RIGHTS* (1984).

5. See authorities cited *supra* note 1. For further examples of the plainly dominant rights-focused scholarship, see Kelly Thompson Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399 (2000); Rebecca R. Glasgow, *Can Students Sue When Schools Don't Make the Grade?*, 76 WASH. L. REV. 893 (2001).

6. For a diagnosis of overreliance on the concept of rights, see MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). See also ANTHONY KRONMAN, *THE LOST LAWYER* (1995); Mark Tushnet, *An Essay On Rights*, 62 TEX. L. REV. 1363 (1984). Ambivalently, see GAJDA, *supra* note 1.

7. Within ethics, virtue theory, for example, is commonly distinguished from approaches that emphasize the assertion and denial of rights of whatever nature, strength, and scope. For some leading contemporary book length treatments of various forms of virtue ethics, see ROBERT M. ADAMS, *A THEORY OF VIRTUE: EXCELLENCE IN BEING FOR THE GOOD* (2006); MARCIA W. BARON, PHILIP PETIT & MICHAEL SLOTE, *THREE METHODS OF ETHICS* (1997) (contrasting Kantianism, Utilitarianism, and Virtue Theory); PHILIPPA FOOT, *VIRTUES AND VICES* (1977); PETER GEACH, *THE VIRTUES* (1977); THOMAS HURKA, *VIRTUE, VICE, AND VALUE* (2001); ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999); ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1985); JOSEPH PIEPER, *THE FOUR CARDINAL VIRTUES* (Richard Winston et al. trans. 1966); MICHAEL SLOTE, *MORALS FROM MOTIVES* (2001); CHRISTINE SWANTON, *VIRTUE ETHICS: A PLURALISTIC VIEW* (2003). For emphasis on the psychology of virtue, see CHRISTOPHER PETERSON & MARTIN SELIGMAN, *CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION* (2004). The significance of the pursuit of certain virtues by individuals and by groups and collectivities at various levels is addressed below throughout.

The approach explored herein begins with some basic, more or less uncontroversial, ideas of virtue and vice.⁸ Some basic personal and civic virtues will constitute our first alternative vantage point on education law. These ideas are in turn closely related to the broad family of what are called perfectionist theories of ethics.⁹ Perfectionism, or the development and fulfillment of the person, will then constitute a closely related second alternative vantage point. Additionally, the best perfectionist theories of ethics can in turn be related to a more explicitly legal theory of longer-term cultural progress.¹⁰ Promotion of genuine cultural progress will thus constitute our third alternative vantage point. Each of these concerns should more importantly supplement and inform education law at the federal and state constitutional and statutory levels.

We should begin, though, with an important clarification. Our inter-related three part emphasis will be on basic personal and civic virtue, on developmental perfectionism, and on cultural progress over time. Concerns for virtue, perfectionism, and cultural progress have historically taken a wide variety of forms, many of which we freely admit are decidedly unattractive. The approaches to basic personal and civic virtue, developmental perfectionism, and cultural progress emphasized herein must be attractive from a broadly liberal perspective. That is, they must promote, or at least be compatible with, appealing versions of crucial liberal values. These liberal values include liberty,¹¹ equality,¹² fraternity or community,¹³ autonomy,¹⁴ the dignity of persons,¹⁵ and the rights crucial to those liberal values.¹⁶

Ultimately, the law of education must appropriately promote a defensible combination of the crucial broadly liberal values, whether through a

8. See *infra* Part IV.

9. See *infra* Part V.

10. See *infra* Part VI.

11. See *infra* note 250 and accompanying text.

12. See *infra* note 165 and accompanying text.

13. See *infra* note 168 and accompanying text. For some relevant theory, see R. George Wright, *Homelessness and the Missing Constitutional Dimension of Fraternity*, 46 LOUISVILLE L. REV. 437 (2009).

14. See classically IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor trans., Cambridge Univ. Press 1998) (1785).

15. See *id.* With specific relevancy, see R. George Wright, *Dignity and Conflicts of Constitutional Values*, 43 SAN DIEGO L. REV. 527 (2006); R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 RICHMOND L. REV. 271 (2002).

16. The extent to which appealing versions of each of these liberal values must themselves inevitably be traded off against one another remains contested. See, for example, the conflicting approaches to liberty evident among the contributors to *THE LEGACY OF ISAAH BERLIN* (Mark Lilla et al. eds., 2001), and on the purported tradeoffs between liberty and equality, in crucial senses, in ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974) and KAI NIELSEN, *LIBERTY AND EQUALITY* (1985).

focus on rights or not. But the law of education should, we shall argue, give crucial attention to appropriate forms of the crucial virtues, to developmental perfectionism, and to overall cultural progress over time, as promoted in appropriate ways, even though these crucial elements are not naturally and irreducibly expressed in the language of rights. Our emphasis will therefore not be exclusively on the language of rights, but on some basic virtues, perfectionism, and cultural progress, or generally on what taken together would be a more value-oriented or goal-oriented approach to education law. Thus, we will be thinking throughout in terms of the promotion of legal policy values and goals as much as in terms of rights. Our concluding section will illustrate this approach with concreteness and detail.

II. EDUCATION: PURPOSES, RECENT OUTCOMES, AND LEGAL MECHANISMS FOR REFORM

A. EDUCATIONAL PURPOSES AND RIGHTS LANGUAGE

Public and private schools of various sorts have goals, values, missions, and purposes. Schools are thus purposive institutions, whether a school recognizes and articulates any such purpose or not. Such purposes are likely to be multiple, if also only vague and implicit. Some purposes may be more central, or of ultimately greater importance, than others, and certainly schools may succeed in their basic purposes to greater and lesser degrees. A crucial focus of education law should be on promoting appropriate purpose-fulfillment, whether through a rights-strategy or not.

At the most exalted levels of education, a school's mission might involve seeking "to contribute to society through the pursuit of education, learning, and research at the highest international levels of excellence."¹⁷ Such a school might refer to "enriching the international, national, and regional communities through the fruits of its research and the skills of its graduates."¹⁸ At the undergraduate level, Harvard College "strives to create knowledge, to open the minds of students to that knowledge, and to enable students to take best advantage of their educational opportunities."¹⁹

17. *The University's Mission and Core Values*, UNIVERSITY OF CAMBRIDGE, <http://www.admin.cam.ac.uk/univ/mission.html> (last visited Apr. 22, 2009). Cambridge University lists its "core values" simply as "freedom of thought and expression" and "freedom from discrimination." See *id.*

18. *Our Aims—University of Oxford*, SAATCHI ONLINE, http://www.saatchi-gallery.co.uk/artcolleges/InfoAll/our_aims/ac_id/536 (last visited Feb. 11, 2011).

19. Harry R. Lewis, *The Mission of Harvard College*, HARVARD UNIVERSITY (Feb. 23, 1997), www.harvard.edu/siteguide/faqs/faq110.php. See also *Mission Statement*, UNIVERSITY OF MICHIGAN, <http://www.umich.edu/pres/mission.php> (last visited April 22, 2009) (emphasizing service to "the people of Michigan and the world through preeminence in creating, communicating, preserving and applying knowledge, art, and academic values,

At the elementary and secondary school levels in particular, education is expected to promote “the shared values of a civilized social order.”²⁰ Such schools are to serve as “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”²¹ As the Supreme Court classically observed in *Brown v. Board of Education*,²² education “is the very foundation of good citizenship.”²³

Part of the work of the schools can be put negatively, as in John Dewey’s formulation: “it is the business of the school environment to eliminate, so far as possible, the unworthy features of the existing environment from influence upon mental habitudes.”²⁴ Part of the work can be put in more positive terms, as in the contemporary declaration that “[s]chools must unabashedly teach students about key virtues such as honesty, dependability, trust, responsibility, tolerance, respect, and other commonly held values important to our society.”²⁵ Such declarations generally echo the sentiments of the Constitution’s founding-era educators.²⁶ Such sentiments, focusing on basic virtues, personal and social development, and on a broad competence and sense of civic and social responsibility,²⁷ are not reducible to even the broadest discourse of rights.

and in developing leaders and citizens who will challenge the present and enrich the future”); USC BOARD OF TRUSTEES, *ROLE AND MISSION OF THE UNIVERSITY OF SOUTHERN CALIFORNIA* (1993), http://www.usc.edu/private/factbook/USCRole_and_Mission_Statement_1993.pdf (“The central mission of the University of Southern California is the development of human beings and society as a whole through the cultivation and enrichment of the human mind and spirit.”) (thus adopting a developmental and culturally progressive view of education’s purpose). For discussion of university missions in the context of academic freedom issues, see R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793 (2007).

20. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986)).

21. *Id.* at 272 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

22. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

23. *Id.* at 493.

24. JOHN DEWEY, *DEMOCRACY AND EDUCATION* 19-20 (Dover ed., 2004) (1916).

25. See *NASSP Statement of Values*, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, <http://www.principals.org/Content.aspx?topic=47103> (last visited Feb. 11, 2011). See also Bill Honig, *Teaching Values Belongs in our Public Schools*, NASSP BULL., Oct. 1990, at 6-9.

26. See, e.g., Thomas Jefferson, 1818 Report for the University of Virginia, reprinted in THOMAS JEFFERSON, *WRITINGS* 459-60 (Merrill D. Peterson ed., 1984) (including, as an aim of primary education, “[t]o improve, by reading [the student’s] morals and faculties; To understand his duties to his neighbors and country . . .”).

27. See *supra* notes 20-26 and accompanying text. For further discussion, see R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 208-11 (2007).

B. SOME RECENT GROUNDS FOR CONCERN IN FULFILLING EDUCATIONAL PURPOSES

If the focus on rights had generated uniformly satisfactory educational outcomes in the realms of equity and achievement, the case for reform would be less compelling. But it is difficult to see the educational status quo, and its measurable outputs, as uniformly satisfactory. Results under the No Child Left Behind Act, even on the specifically tested subjects themselves, have not been uniformly inspiring.²⁸ To the extent that the focus of any school's attention, and of rewards and punishments, is on pass rates on moderately difficult tests on selected subjects, such a focus will have predictable unfortunate consequences. We should expect, for example, reduced attention to both high achievers and low achievers, neither group being likely at modest cost to change its test status, and we should expect reduced attention as well to any untested subjects and skills.²⁹

More broadly, and despite the difficulty of comparisons across time, there appears to be substantial room for nationally improved general test scores;³⁰ improvement in vocabulary,³¹ and improvement in adult literacy,³²

28. See 2008-09 Adequate Yearly Progress (AYP) Results: Many More Schools Fail in Most States, NAT'L EDUC. ASS'N (Oct. 20, 2008), www.nea.org/home/16107.htm; National Education Association Center on Education Policy: NCLB Narrows the Curriculum, NAT'L EDUC. ASS'N (Feb. 2008), www.nea.org/home/17993.htm; Study Says Low and High Achievers Being Left Behind, NAT'L EDUC. ASS'N (July 2007), www.nea.org/home/18007.htm (citing Derek Neal & Diane Whitmore Schanzenbach, *Left Behind By Design: Proficiency Counts and Test-Based Accountability*, (Nat'l Bureau of Econ. Research, Working Paper No. 13293, 2007), http://harrisschool.uchicago.edu/faculty/articles/diane_left.pdf ("We were told to cross off the kids who would never pass. We were to cross off the kids who, if we handed them the test tomorrow would pass. And then the kids who were left over, those were the kids we were supposed to focus on.")).

29. See *supra* note 28; James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004); Jason M. Solomon, *Review, Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 831-32 (2008) (balancing some reduced group achievement gaps and increased averages against diluted standards, narrower educations, and inattention to less prepared students); Eli Savit, *Can Courts Repair the Crumbling Foundations of Good Citizenship?*, 107 MICH. L. REV. 1269 (2009).

30. See, e.g., E.D. HIRSCH, JR., *THE KNOWLEDGE DEFICIT: CLOSING THE SHOCKING EDUCATION GAP FOR AMERICAN CHILDREN 2* (2006); *The Nation's Report Card: NAEP 2008 Trends in Academic Progress*, NAT'L CENTER FOR EDUC. STATISTICS (April 28, 2009), <http://nces.ed.gov/nationsreportcard/pdf/main2008/2009479.pdf>; John Heckinger, *Class of '08 Fails to Lift SAT Scores*, WALL ST. J., Aug. 27, 2008, at D1, available at <http://online.wsj.com/article/SB121976327145773009.html>; *2009 College Bound Seniors Average SAT Scores*, FAIRTEST, <http://www.fairtest.org/files/2009%20SAT%20Scores.pdf> (indicating stagnation (with increasing numbers of test takers) at disturbing levels).

31. For a provocative formulation written before much of the ongoing technological revolution in personal communications, see David W. Orr, *Verbicide*, 13 CONSERVATION BIOLOGY 696, 696 (1999).

knowledge of basic history,³³ science,³⁴ and civics.³⁵ In each of these areas, measures of equity and achievement, while mixed, are commonly less than impressive,³⁶ on a national or international comparative basis.

If we focus, say, on education in basic civic knowledge, the evidence of accomplishment is less than reassuring. Consider, for example, the conclusions of the noted scholar William A. Galston:

Whether we are concerned with the rules of the political game, political players, domestic policy, foreign policy, or political geography, student performance is quite low. This raises a puzzle. The level of formal schooling in the United States is much higher than it was fifty years ago, but the civic knowledge of today's students is at best no higher than that of their parents and grandparents. We have made a major investment in formal education, without any discernible payoff in increased civic knowledge.³⁷

32. See Doris Lessing, *Nobel Lecture: On Not Winning the Nobel Prize* (Dec. 7, 2007), available at http://nobelprize.org/nobel_prizes/literature/laureates/2007/lessing-lecture_en.html; *Reading at Risk: A Survey of Literary Reading in America*, NAT'L ENDOWMENT FOR THE ARTS, (2004), www.arts.gov/pub/RaRExec.pdf (quantifying the by now only limited adult interest in reading). On the measurement of classroom attention spans, see Karen Wilson & James H. Korn, *Attention During Lectures: Beyond Ten Minutes*, 34 TEACHING OF PSYCH. 85 (2007).

33. See, e.g., Frederick M. Hess, *Still at Risk: What Students Don't Know, Even Now*, COMMON CORE (2008), http://www.commoncore.org/_docs/CCreport_stillatrisk.pdf; *The Nation's Report Card: U.S. History 2006*, NAT'L CENTER FOR EDUC. STATISTICS (May 2007), <http://nces.ed.gov/nationsreportcard/pdf/main2006/2007474.pdf>.

34. See, e.g., *American Adults Flunk Basic Science*, CAL. ACAD. OF SCI. (Feb. 25, 2009), http://www.calacademy.org/newsroom/releases/2009/scientific_literacy.php; *PISA 2006 Science Competencies for Tomorrow's World*, PROGRAMME FOR INT'L STUDENT ASSESSMENT (2007), <http://www.oecd.org/dataoecd/15/13/39725224.pdf> (showing United States students as performing below the OECD average).

35. See William A. Galston, *Civic Education and Political Participation*, PS: POL. SCI. & POL., Apr. 2004, at 263, 264, available at www.apsanet.org/imgtestCivicEd/PoliticalParticipation.pdf.

36. See *supra* notes 30-35 and accompanying text. Beyond the various problems of equity and effectiveness, there are the substantial underlying problems of the inadequacy or unavailability of school supplies, as well as remarkable sheer physical disrepair of school buildings themselves. See Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 993 (2001).

37. See Galston, *supra* note 35, at 264. See also *Losing America's Memory: Historical Illiteracy in the 21st Century*, AM. COUNCIL OF TRUSTEES & ALUMNI (Feb. 21, 2000), www.econ.berkeley.edu/users/webfac/czelusta/acta.pdf. For further discussion in the context of the underlying logic of public school free speech rights, see R. George Wright, *Tinker and Student Free Speech Rights: A Functionalist Approach*, 41 IND. L. REV. 105 (2008).

None of this is to claim that the predominant focus on rights-claims in the law of education has itself caused the apparent deficiencies in the American educational system. Our point is far less ambitious. Different sets of recognized rights might have led to different outcomes. But in expanding the focus of education law beyond any set of rights claims, we are certainly not tampering with any current perfection in educational equity³⁸ or effectiveness.³⁹ Our point is merely that there is ample room for responsible reform of education law and for enhancing the degree to which education fulfils its purposes and potential, in ways not most fully and naturally stated in terms of various rights reforms.

C. THE BROAD RANGE OF AVAILABLE TECHNIQUES FOR THE LEGAL REFORM OF EDUCATION

The various possible ways in which public and private education may be regulated cover a broad range.⁴⁰ Regulation may have technical or narrow efficiency-oriented goals, but may also have, as in the case of much important education regulation, “cultural, social and ethical” aims.⁴¹ Regulation can be more or less sensitive, as in the case in particular of education reform, to costs and benefits that are difficult to quantify,⁴² and to costs and benefits to future generations.⁴³

Regulation in general, including regulation of education, can take various procedural⁴⁴ and substantive forms.⁴⁵ Thus among the most common general regulatory techniques, we find “prohibitions; licensing; price, rate,

38. Classically, see JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991); JONATHAN KOZOL, *DEATH AT AN EARLY AGE* (1967); JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* (2005).

39. See *supra* notes 30-37 and accompanying text.

40. At a mainly descriptive level, consider the typology offered in Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998) (distinguishing public choice theory, neopluralist theory, public interest theory, and civic republican theories of administrative regulation).

41. Patricia Hodgson, *The Rise and Rise of the Regulatory State*, 77 POL. Q. 247, 249 (2006). See also Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 68 (1995).

42. See, e.g., Thomas O. McGarrity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1294-95 (1987).

43. See *id.* at 1295-96. For a broader perspective, see R. George Wright, *The Interests of Posterity in the Constitutional Scheme*, 59 U. CIN. L. REV. 113 (1990).

44. See, e.g., Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179 (2005) (focusing in particular on traditional formal and informal rulemaking, negotiated rulemaking, and litigation approaches).

45. See, e.g., MARC ALLEN EISNER ET AL., *CONTEMPORARY REGULATORY POLICY* 11 (2d ed. 2006); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 11 (6th ed. 2006).

and quantity restrictions; product standards; technical production standards; performance standards; subsidies; information provision; and assigning property rights and liability.”⁴⁶ An alternative listing cites cost of service ratemaking, public interest-based allocation, setting of standards, history-based allocation, screening or licensing, fees or taxes, providing information, subsidies, and noncoercive regulatory techniques.⁴⁷

Nearly all of these mechanisms are used in the regulation of public and private education, in one context or another. Our approach to education law would require only a reprioritizing and rebalancing among these mechanisms, with no net diminishing in valuable forms of liberty, equality, and the other significant liberal values.⁴⁸

In particular, government funding for advanced research⁴⁹ and for other projects of educational value to a broad public⁵⁰ has long been⁵¹ important and remains important for the future.⁵² As well, education regulation can extend well beyond mandates, imposition of standards, and prohibitions, into “softer” regulatory techniques. These could include liberal value-respecting reliance on incentives,⁵³ noncoercive adjustments of the “architecture of choice,”⁵⁴ and the intelligent structuring of legal baselines and default rules.⁵⁵

Finally, the tax system at the federal and state levels, along with various transfer and spending programs, form a crucial element of education

46. EISNER ET AL., *supra* note 45, at 11.

47. See BREYER ET AL., *supra* note 45, at 11.

48. See *supra* notes 11-16 and accompanying text.

49. See, e.g., FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION 214 (2002) (describing the federal government as the largest source of research funding in biotechnology field).

50. See, e.g., Boyd Tonkin, *Review of Michelangelo and the Pope's Ceiling*, THE INDEPENDENT (Nov. 27, 2002), <http://www.independent.co.uk/arts-entertainment/books/reviews/michelangelo-and-the-popes-ceiling-by-ross-king-605490.html> (describing the 1508 contract between Pope Julius II and Michelangelo for the Sistine Chapel ceiling frescos set at 3,000 ducats).

51. See *id.*

52. See FUKUYAMA, *supra* note 49, at 214.

53. For a broad and sophisticated treatment, see DONALD E. CAMPBELL, INCENTIVES: MOTIVATION AND THE ECONOMICS OF INFORMATION (2d ed. 2006).

54. See RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008). This is not to suggest that all cases of the unobtrusive reframing of alternatives involve full respect for the classic liberal values, including liberty itself. For discussion, see Robert H. Frank, *Book Reviews: Nudge: Improving Decisions about Health, Wealth, and Happiness*, 119 ETHICS 202 (2008).

55. See, e.g., GERD GIGERENZER, GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS 183 (2007) (stating that in some contexts, “the evidence indicates that it is the default rule rather than a stable [personal] preference that drives most people’s behavior”).

law.⁵⁶ The current overall system of tax deductions, tax subsidies, credits and grants, and loans and work-study programs may not be well-coordinated from the standpoints of efficiency or equity.⁵⁷ But neither does the current system recognize the full extent to which an educational system might contribute to overall cultural progress over time beyond the economic gains accruing directly to educated individuals and their families.⁵⁸

In fact, the very inefficiencies and inequities under current overall education taxing and spending programs should encourage us in the belief that the legal reform of education can promote the relevant virtues, perfectionist gains, and long-term cultural progress, along with the crucial liberal values. Individuals making personal decisions about their own education may well not take the broad societal benefits from education—including the value of sustained cultural progress itself—into proper account.⁵⁹ But well-designed, coordinated legal reforms have the potential to more fully do so.⁶⁰

III. SOME LINKAGES BETWEEN EDUCATION AND THE BASIC VIRTUES, PERFECTIONISM, AND CULTURAL PROGRESS

Markets in their place clearly are of immense value.⁶¹ But markets themselves inevitably involve what are called opportunity costs.⁶² In some cases, the opportunity costs of the dominance of markets and market relations can be monumental. Of late, education in general and higher education in particular have been increasingly taking on a clear and explicit market character.⁶³ Whatever their initial or private ambivalence, many educa-

56. See, e.g., Kerry A. Ryan, *Access Assured: Restoring Progressivity in the Tax and Spending Programs for Higher Education*, 38 SETON HALL L. REV. 1, 2 (2008).

57. See *id.* We may include student loan deferment, forgiveness, and bankruptcy discharge policy under the rubric of student loans.

58. See *id.* at 10-11. Note that the painter Michelangelo, though extremely well-paid by contemporary standards, failed to capture even a minuscule fraction of the arguable net societal benefits flowing from his work, which may suggest their undersupply. See *id.* at 11; Tonkin, *supra* note 50.

59. See Ryan, *supra* note 56, at 11.

60. There are of course limits of one sort or another to every legal reform project, as noted classically in DAVID HUME, *IDEA OF A PERFECT COMMONWEALTH* (1754), available at <http://www.constitution.org/dh/perfcomw.htm>.

61. See, classically, Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

62. See, e.g., DANIEL K. FINN, *THE MORAL ECOLOGY OF MARKETS: ASSESSING CLAIMS ABOUT MARKETS AND JUSTICE* 54-75 (2006); *The Opportunity Cost Doctrine*, THE HIST. OF ECON. THOUGHT WEBSITE, <http://homepage.newschool.edu/~het/essays/margrev/oppcost.htm> (last visited Feb. 13, 2011).

63. See, e.g., *DECLINING BY DEGREES: HIGHER EDUCATION AT RISK* 61-130 (Richard H. Hersh & John Merrow eds., 2005).

tional institutions have explicitly embraced a market-focused understanding of their relationship with their current students, prospective students, and the broader society.⁶⁴

There is thus a tendency for higher educational institutions especially to think of students as consumers, and of their relationship with their students as one of supplier and customer.⁶⁵ Customers must be attracted and retained. Now, there is no absolutely essential conflict between increasingly explicit market relationships in education and promoting virtues, perfectionism, and long-term cultural progress. But there is, realistically, obvious potential for conflict between increasingly self-conscious market-driven consumption in education and the fuller cultivation of the virtues, perfectionism, and long-term cultural progress.⁶⁶

The severity of this conflict partly reflects the character of the broader culture. In a culture that prized the basic virtues, perfectionism, and long-term cultural progress, a marketplace mentality on the part of students and educational institutions might, ironically, operate to promote such values, at least until success in markets or consumption itself became the new predominant cultural values.⁶⁷ But if the broader culture already deemphasizes the basic virtues, perfectionism, and cultural progress, we should expect market-focused schools and students to accommodate such a de-emphasis, at least until the consequences of doing so become widely unattractive. In the meantime, any individual school that tries to reduce the role of market considerations in its own operations may pay a high competitive price. Some much broader reform may therefore be the only practical sort.

We need not, however, be prematurely pessimistic about the long term cultural effects of markets. By way of a loose analogy, both a doughnut shop and a commercial physical workout facility can be responding to market demand. And neither individuals nor societies need feel helplessly driven to prefer the doughnut shop over the workout facility,⁶⁸ especially if

64. *See id.*

65. *See id.*

66. For useful discussion, see DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (20th anniv. ed. 1996) (showing capitalism as increasingly dependent upon a desire for personal gratification that is incompatible with sustaining the virtues and institutions that led to the success of capitalism in the first place).

67. *See id.* *See also* *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY 1880-1980* (Richard Fox & T.J. Jackson Lears eds., 1983).

68. After all, in some respects, the amenities of the elite strenuous workout facility may actually appeal to the desire for individual pampering and self-indulgence even more than the no-frills doughnut shop. And we notice the cultural contradictions of self-indulgence every time we must wait in long lines to have our subjective impulses catered to at a coffee shop because of the time consumed in similarly catering to the subjective impulses of all those ahead of us in line. Our moments of self-indulgence at the head of the line

they have been vividly provided with full and accurate information about the long-term consequences of their choices.⁶⁹

Market outcomes, of course, depend upon processes of preference formation, and preferences can be shaped, partly by a legal system, in a variety of objectionable or unobjectionable ways.⁷⁰ Educational institutions inevitably have some capacity to encourage what we might consider virtue or vice⁷¹ among their students, regardless of grade level.⁷² Educational institutions may be conflicted about substantive ideals and about the legitimacy or the importance of developing the characters of their students.⁷³ But the capacity of educational institutions to affect the development of virtue and vice among students remains—especially in light of the wide range of legal regulatory mechanisms potentially available.⁷⁴ If individual schools feel powerless to reform in this respect, schools can lobby for universally legally binding regulations.

The crucial virtues themselves need not be infinitely controversial in their description or identity, or in legitimate methods of inculcation. A number of the basic virtues appeal rather broadly across ideological lines.⁷⁵ Some of the basic personal virtues are difficult to separate from popular civic virtues in the sense of virtues that contribute indispensably to the flourishing of the republic.⁷⁶ Consider, to illustrate both these points, the arguments of the well-known political scientist and educational leader Amy Gutmann:

Since many of the virtues defended by conservatives—honesty, respect for law, fairness, self-discipline—are necessary for students to appreciate the advantages of democratic politics, schools should do their best to inculcate these virtues. But if character is, as Webster defines it, “strength of mind, individuality, independence, moral qual-

depend upon the prior hard discipline and deferred gratification of waiting, while our predecessors are similarly accommodated.

69. As we have seen, the law can promote the dissemination of information, as well as provide “nudges” and subsidies and tax incentives, including taxes on calorie consumption, of various sorts. *See supra* notes 45 & 54 and accompanying text.

70. *See, e.g.,* THALER & SUNSTEIN, *supra* note 54.

71. There is some evidence that the incidence of cheating and its rationalization have increased on college campuses over the past half century. *See* DEREK BOK, *OUR UNDERACHIEVING COLLEGES* 148-49 (2006).

72. *See id.* at 159.

73. *See id.* at 170. More affirmatively, *see* Honig, *supra* note 25.

74. *See supra* notes 45-47 and accompanying text.

75. *See* AMY GUTMANN, *DEMOCRATIC EDUCATION* 58 (1999).

76. *See id.*; DAVID L. KIRP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION 263 (2003) (asking whether contemporary universities can be said to contribute to the development of “responsible citizens”).

ity,” then teaching students how to defend democracy and to reason about our political disagreements is no less essential to developing moral character than instilling the less intellectual virtues of fidelity, kindness, honesty, respect for law, diligence, and self-discipline.⁷⁷

As we further explore the relevant virtues below,⁷⁸ we shall see that accounts of virtue and the legitimate encouragement of virtue need not be more controversial, divisive, or biased than many other dimensions of educational policy, that the appropriate promotion of virtue in the schools need not vitally conflict with the crucial liberal values,⁷⁹ and that such promotion of the virtues through education is not reducible to any form of the rights talk⁸⁰ that pervades education law.

Closely related to the ideas of virtue and character development are the ideas of perfectionism, to be explored below,⁸¹ and ultimately of a broader cultural progress over time.⁸² Without yet further defining the idea of perfectionism, we can link education and perfectionism by classic analogy to the development, realization, and flourishing involved in the transition from an acorn to a mature oak tree. It is perfectionism that is at stake when Dean Anthony T. Kronman more directly observes that “[w]e want to know how the world works for the sake of such knowledge itself, apart from any practical benefits it yields.”⁸³ Education, when appropriately structured, can offer us something of this vital perfectionist possibility.

A sense of the linkages between education and both perfectionism and long-term cultural progress is provided by the philosopher, and the Enlightenment liberal value icon, Immanuel Kant. Kant argues that “with education is involved the great secret of the perfection of human nature.”⁸⁴ And for Kant, education’s contribution to this sort of perfectionism is inseparable from education’s contribution to long-term cultural progress. Kant argues that “through education human nature will be continually improved This opens out to us the prospect of a happier human race in the future.”⁸⁵ Broad cultural progress across time is emphasized as well in Kant’s declaration that “children ought to be educated, not for the present, but for a

77. See GUTMANN, *supra* note 75, at 58.

78. See *infra* Part IV.

79. See *supra* text accompanying notes 11-16.

80. See *supra* notes 1-7 and accompanying text.

81. See *infra* Part V.

82. See *infra* Part VI.

83. ANTHONY T. KRONMAN, *EDUCATION’S END* 215 (2007).

84. IMMANUEL KANT, *EDUCATION* 7 (A. Churton trans., Univ. of Mich. Press 1960) (1803).

85. *Id.* at 8.

possibly improved condition of man in the future; that is, in a manner which is adapted to the *idea of humanity* and the whole destiny of man.”⁸⁶

It is Immanuel Kant, the great Enlightenment liberal, who links education, perfectionism, and cultural progress suggests, in ways further explored below,⁸⁷ that sensibly promoting perfectionism and broad cultural progress need not conflict with the crucial liberal values⁸⁸ in any disqualifying way. Kant’s language above also suggests that an education law regime aiming at individual and collective development and progress over time cannot be entirely reduced to the declaration, denial, and enforcement of any set of rights. The educational future boldly, if necessarily vaguely, envisioned by Kant cannot be confined simply to matters of rights and entitlements.

IV. VIRTUES AND THEIR LEGITIMATE PROMOTION THROUGH THE EDUCATIONAL SYSTEM

The subject of the virtues, and of their appropriate promotion by educational systems, must at some point become controversial. But we can begin with what is familiar, if not entirely uncontroversial. Aristotle famously distinguishes between intellectual virtues⁸⁹ and moral virtues,⁹⁰ with “wisdom and understanding and prudence”⁹¹ as intellectual virtues, and “liberality and temperance”⁹² among the moral virtues.

Our interest is not in controversial attempts to pin down the nature of virtue in general,⁹³ or even with particularly controversial alleged virtues.⁹⁴

86. *Id.* at 14. Note that Kant does not seem to take progress as inevitable, regardless of the legal and other public policies we choose to adopt. More narrowly, and perhaps less attractively in some respects, see AUGUSTE COMTE, INTRODUCTION TO POSITIVE PHILOSOPHY 24 (Frederick Ferre trans., The Libr. of Liberal Arts 1970) (1830) (arguing for “replacing our European education, which is still essentially theological, metaphysical, and literary, by a positive education in accordance with the spirit of our time and adapted to the needs of modern civilization”).

87. *See infra* Parts V-VI.

88. *See supra* text accompanying notes 11-16.

89. ARISTOTLE, THE NICOMACHEAN ETHICS BOOK II, 1103a at 30 (J.A.K. Thomson trans., Penguin Books 2003) (n.d.).

90. *See id.*

91. *Id.* For Aristotle’s definition of the virtue of prudence or practical wisdom, see *id.* at BOOK V, 1140a at 150. For further discussion by a leading classicist, see T.H. Irwin, *Prudence and Morality in Greek Ethics*, 105 ETHICS 284 (1995).

92. ARISTOTLE, *supra* note 89, at BOOK II, 1103a at 30.

93. For Aristotle’s account of virtue in general, as a kind of habit or purposive disposition, see *id.* at BOOK II, 1107a at 42. Alasdair MacIntyre defines a virtue as “an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.” ALASDAIR MACINTYRE, THE NATURE OF THE VIRTUES, in VIRTUE ETHICS 118, 128 (Roger Crisp & Michael Slote eds., 1997). For further broad definitional efforts, see CHRISTINE SWANTON, VIRTUE ETHICS: A PLURALISTIC VIEW 19 (2003); DAVID

Rather, it is with how important virtues, widely thought to be of value for the realization of personal capacities and cultural progress over time, can be legitimately promoted through educational schemes, in ways consistent with the crucial liberal values.

We do not deny that purported virtues are often cited in repressive or group-biased ways. The ideological function of counseling patience,⁹⁵ forgiveness, meekness, and humility to systematically oppressed groups seems obvious enough. More broadly, a focus on individual virtues (and vices) can obscure the realities of institutional power structures behind assertions of individualized fault, blame, and responsibility.⁹⁶ And even genuine virtues can be put in the service of appalling ends.⁹⁷

HUME, A TREATISE OF HUMAN NATURE BOOK III, pt III (L.A. Selby-Bigge ed., 2d ed. 1978) (1740). For a useful contemporary look at some more or less corresponding vices, see REBECCA KONYNDYK DEYOUNG, GLITTERING VICES (2009). For a sense of a virtue ethics in the Buddhist tradition, see DAMIEN KEOWN, BUDDHIST ETHICS: A VERY SHORT INTRODUCTION 25-26 (2005).

94. For discussion by Thomas Aquinas of the classically recognized four cardinal virtues of prudence or practical wisdom, temperance or appropriate self-restraint of impulse, fortitude or perseverance or courage, and the sense of what is due to self and others as a matter of justice, see ST. THOMAS AQUINAS, TREATISE ON THE VIRTUES qu. 61, art. 2, respon-dio, at 110 (John A. Oesterle trans., 1984) (encompassing the Summa Theologica I-II, qu. 49-67). Aquinas draws from Aristotle a listing of eleven moral virtues associated with the passions, including “fortitude, temperance, liberality, magnificence, magnanimity, love of honor, gentleness, friendliness, truthfulness, . . . well-bred insolence . . . [and] justice . . .” We make no claims for the value or universality of all these purported virtues, including, most conspicuously, for “well-bred insolence.” See *id.* at qu. 60, art. 5 respon-dio, at 106-07. For a representative of our own founding culture, see BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 67-68 (Simon & Schuster 2004) (1791) (omitting the virtue of courage, but including temperance, silence, order, resolution, frugality, industry, sincerity, justice, moderation, cleanliness, tranquility, chastity, and humility). Again, we hold no brief for any such listing, or its constituents. Interestingly, Franklin’s purported virtue of “industry” seems less about affirmatively striving and achieving, and more about not wasting time. See *id.* For a more recent treatment of the four classic virtues, see JOSEPH PIEPER, THE FOUR CARDINAL VIRTUES (1966). For a recent broader listing, see ANDRE COMTE-SPONVILLE, A SMALL TREATISE ON THE GREAT VIRTUES IX-X (2001) (1996) (listing “politeness, fidelity, prudence, temperance, courage, justice, generosity, compassion, mercy, gratitude, humility, simplicity, tolerance, purity, gentleness, good faith, humor and love”).

95. For a classic response, see MARTIN LUTHER KING, JR., WHY WE CAN’T WAIT (Signet Classic 2000) (1964). See also Eamonn Callan, *Patience and Courage*, 68 PHIL. 523, 524 (1993). But see FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (Walter Kaufmann trans., Vintage Books 1989) (1887).

96. For discussion of the ideological abuse of the ideas of individual blameworthiness and responsibility, see R. GEORGE WRIGHT, DOES THE LAW MORALLY BIND THE POOR? 7-39 (1996).

97. See DENIS DIDEROT, RAMEAU’S NEPHEW IN RAMEAU’S NEPHEW AND OTHER WORKS 58 (Jacques Barzun & Ralph H. Bowen trans., Libr. of Liberal Arts 1964) (1805). Consider a U-boat commander who evidently displays the virtues of courage and presence of mind under pressure, in the service of an obviously horrific cause. To claim that his apparent

We have a clear sense, though, of the practical indispensability of a number of the familiar virtues, appropriately defined. Admittedly, even as to virtue in general and the four classic or cardinal virtues,⁹⁸ exception can be taken.⁹⁹ But certain virtues do seem indispensable if we are to achieve certain desired individual and collective goals.

Thus, the philosopher Peter Geach defends the four classic cardinal virtues in the following terms:

[T]hese virtues are needed for any large scale worthy enterprise, just as health and sanity are needed. We need prudence or practical wisdom for any large scale planning. We need justice to secure cooperation and mutual trust among men, without which our lives would be nasty, brutish, and short. We need temperance in order not to be deflected from our long-term and large-scale goals by seeking short-term satisfactions. And we need courage in order to persevere in the face of setbacks, weariness, difficulties, and dangers.¹⁰⁰

The basic virtues, at this level of generality, do seem necessary if persons are to develop through a process of self-perfection, and if societies are to progress over time in any recognizable sense. And there does seem to be a meaningful, if limited degree of consensus, across time and culture; on the value of some basic virtues, generally defined.¹⁰¹

courage in the service of an ignoble end cannot be real courage is to flout standard usage. This is not to deny that these who evidently act courageously may have very different underlying motives and dispositions. See, e.g., Robert Gay, *Courage and Thumos*, 63 PHIL. 255, 256 (1980) (discussing Amelie Rorty, *The Two Faces of Courage*, 61 PHIL. 151 (1986)). But cf. N.J.H. Dent, *The Value of Courage*, 56 PHIL. 574, 574 (1981) (citing Schopenhauer as denying that courage is a virtue).

98. See *supra* note 94 and accompanying text.

99. For critiques of the very idea of a stable and reliable virtuous character, see Gilbert Harman, *Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error*, 99 PROC. ARISTOTELIAN SOC. 315 (1999). For responses, see James Montmarquet, *Moral Character and Social Science Research*, 78 PHIL. 355 (2003); Joel J. Kupperman, *The Indispensability of Character*, 76 PHIL. 239 (2001).

100. PETER GEACH, *THE VIRTUES* 16 (1977).

101. For an exhaustive and psychologically sophisticated study, see CHRISTOPHER PETERSON & MARTIN SELIGMAN, *CHARACTER, STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION* 50 (2004) ("There is a strong convergence across time, place, and intellectual tradition about certain core virtues."). Peterson and Seligman arrive at a list of six core virtues: "courage, justice, humanity, temperance, transcendence, and wisdom." As one example of cultural convergence, note the general overlap between Plato and the Islamic philosopher Averroes in *AVERRROES, ON PLATO'S REPUBLIC* xvii, 71-72 (Ralph Lerner trans., Cornell Univ. Press 1974) (1457). For an instructive modern example in the American educational context, see the Old Order Amish case of *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Of course, virtues, such as courage and resolution and perseverance, are of little, perhaps even negative, value if they are devoted to worthless or morally objectionable causes. But it is precisely our sense of justice itself, another basic virtue, that should alert us to any questionable moral character of our commitments. Ideally, one such virtue should enhance the value, or minimize the harm, of the misguided exercise of another virtue. The virtues, including that of justice, can be mutually corrective. To the extent this is possible, we need not always look to the idea of rights, as distinct from virtues, to correct our morally mistaken projects. The virtues, including practical wisdom and a sense of the justice owed to others, can also inform our understanding of the admittedly difficult and controversial question of what constitutes genuine societal progress.¹⁰²

One important qualification must immediately be entered, though. Collectively, we ordinarily benefit by the exercises of virtues. The basic virtues are indispensable for anything we would recognize as cultural progress over time. But there can be no guarantee that an individual's virtuous contribution to overall cultural progress must also pay off in every sense for the individual.¹⁰³ An individual may be able to save the group only through a carefully calculated act of self-sacrifice.¹⁰⁴ Now even here, there remains a link between the exercise of individual virtue and societal progress. It is even possible to argue that courageous self-sacrifice, where no alternatives have been overlooked, can amount to the perfectionist self-realization of the self-sacrificing individual. But there admittedly remains a conflict between such public-spirited self-sacrifice and whatever personal developmental goals the self-sacrificing individual leaves unfulfilled.

Our concern for expanding the legitimate role for the certain virtues in education does not imply that virtues are somehow more fundamental than the rights that an educational system does or might promote.¹⁰⁵ Our claim is not that education law should be based on promoting virtues rather than on recognizing rights, but that the current emphasis on rights in education law

102. For merely one example, our best understandings of practical wisdom, temperance, courage, and justice, without additional recourse to the idea of rights, would seem to jointly counsel against bequeathing an unavoidable and irreparable environmental disaster to our cultural successors two or three generations down the road. *See, e.g.*, LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF UNBORN AND FUTURE GENERATIONS (2008); EDWARD A. PAGE, CLIMATE CHANGE, JUSTICE AND FUTURE GENERATIONS (2007). For a philosophically sophisticated but less environmentally focused treatment of justice toward even remote posterity, see TIM MULGAN, FUTURE PEOPLE: A MODERATE CONSEQUENTIALIST ACCOUNT OF OUR OBLIGATIONS TO FUTURE PEOPLE (2009).

103. *See* GEACH, *supra* note 100, at 17.

104. *See id.*

105. For a leading example of a contemporary theory of virtue that does not take virtue to be fundamental in ethics, see ROBERT MERRIHEW ADAMS, A THEORY OF VIRTUE: EXCELLENCE IN BEING FOR THE GOOD (2006).

should be more meaningfully supplemented by concerns for properly promoting virtues, perfectionism, and long-term societal progress.

A lurking problem arises, though: we can assume that the legal system can enforce the rights associated with education, at least to some meaningful degree. But can basic virtues really be somehow legitimately promoted through institutionalized formal education? Plainly, there are stark limits to the degree that schools can inculcate even the most widely endorsed basic virtues. There are limits to the proper methods as well. Many persons or groups may fail to see particular virtues as in their own interests, or they may redefine virtues, including that of justice, in their own interests.

But since the time of Plato¹⁰⁶ and Aristotle,¹⁰⁷ we have believed that to some degree basic virtues can be cultivated through education. This may occur by stimulation of the intellect and imagination, or by training, example, and habituation. Let us consider the virtue of prudence or practical wisdom. It may well be that beyond some point, the perhaps mysterious intuitive judgment involved in exercising practical wisdom cannot be taught, or even reliably identified in its bearer.¹⁰⁸ But this does not mean that the virtue of practical wisdom cannot be promoted among students to different degrees under different educational regimes.

To some degree, the component skills that make up ordinary prudence or practical wisdom seem formally teachable. It has been suggested that “a prudent action or policy is one that involves distinctively human powers of rational foresight and self-control”¹⁰⁹ exercised for the sake of long-term self-protection.¹¹⁰ Whatever the deficiencies of human nature, few would

106. See, e.g., PLATO, *THE REPUBLIC* 232-33 (Francis M. Cornford trans., Oxford Univ. Press 1945) (n.d.) (describing the ordinary virtues, apart from Plato’s distinctive conception of wisdom, as “not far removed from bodily qualities, in that they can be produced by habituation and exercise in a soul which has not possessed them from the first”).

107. See *supra* notes 89-93 and accompanying text; ARISTOTLE, *ARISTOTLE’S ETHICS* 25 (J.O. Urmson et al. trans., Basil Blackwell 1988) (n.d.) (explaining excellences of character or virtue as “largely acquired by teaching”). For some contemporary assessments, see *CAN VIRTUE BE TAUGHT?* (Barbara Darling-Smith ed., 1993); ADAMS, *supra* note 105, at ch. 12.

108. For discussion, see R. George Wright, *Whose Phronesis? Which Phronimoi?: A Response to Dean Kronman on Law School Education*, 26 CUMB. L. REV. 817, 823-24 & n.35 (1996) (discussing practical wisdom among elite baseball managers). For skepticism of character and virtue as a more or less steady disposition, see Robert B. Louden, *On Some Vices of Virtue Ethics*, 21 AM. PHIL. Q. 227 (1984).

109. H.J.N. Horsburgh, *Prudence*, 36 PROC. ARISTOTELIAN SOC. 51, 65 (Supp. vol. 1962).

110. See *id.* See also, as relevant to a broad temperance as well as to prudence, SIGMUND FREUD, *THE EGO AND THE ID* 19 (James Strachey ed., New York W.W. Norton & Co. 1962) (1923) (explaining the ego as bringing the world to bear upon the id, thereby substituting the “reality principle,” including the prudent deferral of gratification, for the “pleasure principle”). Consider, in stark contrast, the pattern in U.S. retirement saving over the past two decades.

deny that formal education, particularly insofar as it points out and emphasizes previously unrecognized risks and benefits, can in some contexts promote wisdom or prudence.¹¹¹ To some degree, such wisdom is a matter of "breadth and depth of knowledge about the conditions of life and human affairs."¹¹² This sort of knowledge, as a key component of the virtue of practical wisdom, seems as formally teachable as any subject matter, with the results depending in part on the nature and quality of the educational system.

The teaching of virtue through formal education should include not only that of prudence and justice, but other forms of distinctively civic virtue, including civility and tolerance, as well. Of course, from the time of the Federalists we have rightly been distrustful of government power to craft the souls of the citizenry.¹¹³ But surely schools can promote the proper virtues in either more,¹¹⁴ or dramatically less,¹¹⁵ coercive or indoctrinative ways. In any event, schools cannot possibly take an entirely neutral or agnostic stand on communicating virtues (or vices). An educational system that seeks to abstain from promoting any and all virtue, personal or more civic in nature, is inescapably steering the students toward some particular

111. See Phillip Bricker, *Prudence*, 77 J. PHIL. 381, 381 (1980) (defining prudence as the tendency to act so as to coordinate and satisfy past, present, and future desires). The coordination of immediate and long-term desires by a medical student, a military cadet, a would-be Olympic athlete, a religious novice, or a patient investor may have many sources, but certainly education and training in formal institutional structures may be one of them.

112. PETERSON & SELIGMAN, *supra* note 101, at 39. Relatedly, consider also the combination of temperance and wisdom in the teachable virtue of self-restraint in avoiding "confirmation bias." See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998); FRANCIS BACON, NOVUM ORGANUM BOOK I, APHORISM 46 (1620) ("The human understanding when it has once adopted an opinion . . . draws all things else to support and agree with it."). For a vision of resistance to confirmation bias, see BERNARD LONERGAN, *Insight: A Study of Human Understanding*, in 3 COLLECTED WORKS OF BERNARD LONERGAN 619 (Frederick E. Crowe & Robert M. Doran eds., 1957).

113. See, e.g., HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 47 (1981); THE FEDERALIST NOS. 10 (James Madison); THE FEDERALIST NO. 43 (James Madison & John Jay) (Terence Ball ed., 2003) ("[I]t is in vain to say, that enlightened statesmen will . . . always be at the helm"). For the classic expression of rather broad skepticism as to coercive inculcation of virtuous sentiments, see JOHN STUART MILL, ON LIBERTY (Alburey Castell ed., Appleton-Century-Crofts 1947) (1859).

114. Toward one extreme, consider some of the formal socialization techniques utilized in ALDOUS HUXLEY, BRAVE NEW WORLD (1932). Much more benignly, see DAVID MCNAUGHTON, MORAL VISION 204-05 (1988) ("What we need to be taught . . . is a way of seeing, a way of being sensitive to the moral facts which we can make our own").

115. Consider the possible influence of a highly motivated, dedicated teacher who constantly displays various intellectual and other virtues in the knowledgeable teaching of her students. On the role of inspiring example, at the level of government and administration, in promoting virtue among the people, see LORD SHAFTSBURY, CHARACTERISTICS OF MEN, MANNERS, OPINIONS, TIMES 272 (John M. Robertson ed. Bobbs Merrill 1964) (1711).

distribution of virtues, however inadvertent or unforeseen the actual results are likely to be. Thus, there is much logic in the recommendation of writers, such as Amy Gutmann¹¹⁶ and William Galston,¹¹⁷ to promote personal and civic virtues in the educational system in ways that respect and further basic liberal values.

In fact, it may be possible to promote the basic virtues through the educational system in systematic ways that are far removed from any sort of propagandizing. It has thus been noted since the time of Aristotle¹¹⁸ that the consistent exercise of a number of the basic virtues may depend upon a degree of material resources being reliably available to the potentially virtuous person. The law in general, and the law of education, inescapably redistributes or ratifies the existing distribution of resources. Of course, even persons who are utterly impoverished can display patience, courage, and even generosity. However, Aristotle is also plainly right in suggesting that acts of nobility and other virtues are often more difficult, if not impossible, without the necessary resources.¹¹⁹

In the context of education law, this dependence of virtue upon sufficient material resources has obvious implications, ranging from the availability of school breakfasts and lunches for those who cannot afford them,¹²⁰ to preschool availability,¹²¹ all the way to teacher pay scales, building maintenance, and the adequacy and coherence of the complex system of university and graduate level grants, loans, and tax-related programs.¹²²

116. See GUTMANN, *supra* note 75, at 58.

117. See GALSTON, *supra* note 35, at 264.

118. See ARISTOTLE, NICOMACHEAN ETHICS book 1, ch. 8, 1099b, *reprinted in* THE BASIC WORKS OF ARISTOTLE 945 (Richard McKeon trans., Modern Library ed. 2001) (1941).

119. See *id.* For commentaries emphasizing the dependence of various virtues on material or external social prerequisites, see SARAH BROADIE, ETHICS WITH ARISTOTLE 54, 247 (1991); T.H. IRWIN, ARISTOTLE'S FIRST PRINCIPLES 384 (1988); ANTHONY KENNY, ARISTOTLE ON THE PERFECT LIFE 40 (1992) (focusing on Aristotelian happiness or eudaimonia rather than specifically on virtue); RICHARD KRAUT, ARISTOTLE ON THE HUMAN GOOD 266 (1989) (for Aristotle, "we must have as many external goods as are needed to promote virtuous activity."); C.D.C. REEVE, PRACTICES OF REASON: ARISTOTLE'S NICOMACHEAN ETHICS 165 (1995) ("Aristotle allows . . . that deprivation of some external goods makes it impossible for a person even to acquire the virtues . . ."); NANCY SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE 9 (1989).

120. See the National School Lunch Act, Pub. L. No. 79-396, § 2, 60 Stat. 230 (1946) (codified as amended at 42 U.S.C. § 1751 (2008)). For analysis and critique, see, for example, J. Amy Dillard, *Sloppy Joe, Slop, Sloppy Joe: How USDA Commodities Dumping Ruined the National School Lunch Program*, 87 OR. L. REV. 221 (2008); Ellen Fried, *The Competitive Food Conundrum: Can Government Regulations Improve School Food?*, 56 DUKE L.J. 1491 (2007).

121. See, e.g., James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49 (2006).

122. See, e.g., Kerry A. Ryan, *Access Assured: Restoring Progressivity in the Tax and Spending Programs for Higher Education*, 38 SETON HALL L. REV. 1 (2008).

Could an argument still be made, though, that promoting basic virtues through education must in the end conflict with the best understandings of the basic liberal values? We will raise a related question in connection with perfectionism and liberal values below.¹²³ In the meantime, it seems clear that persons can come to strongly identify with the virtues with which their education has equipped them.¹²⁴ However, this hardly shows that the process of acquiring such virtues was free and uncoerced. Nor is it convincing to define basic virtues so that to exercise a virtue is simply by definition to display one's freedom.¹²⁵

Ultimately, though, virtues can be taught in educational settings in ways that involve no more violation of the basic liberal values than would the refusal to consciously teach virtues. To merely illustrate a virtue, without propagandizing on its behalf, is not to coercively impose that virtue. More strongly, the crucial virtue of practical wisdom¹²⁶ itself practically requires important forms of the liberal value of individual freedom. It has thus rightly been observed that "to exercise wisdom, people need to be in control of their own lives, and to retain the capacity to make their own choices."¹²⁷

As well, we need not think of the virtues in general, or of practical wisdom in particular, as necessarily elitist or inevitably scarce in a way that is incompatible with basic liberal values. It has traditionally been argued, for example, that "practical wisdom is not the prerogative of the few, but is accessible to all."¹²⁸ The virtues are in this important sense egalitarian, though as we have seen, they often require a foundation in material support.¹²⁹ In fact, the exercise of the virtues, especially civic virtue,¹³⁰ requires that we think about, and value, basic rights and liberties.¹³¹

123. See *infra* Parts V & VI.

124. While this may be true of Plato and Aristotle's educational subjects, it is also true of the majority of each class described in HUXLEY, *supra* note 114. See ARISTOTLE, *supra* note 107, at 26 ("Aristotle . . . echoes Plato . . . in insisting that correct training [in virtuous character] is not coercion."). To strongly wish to act as one has been taught or trained hardly necessarily shows one's freedom in any important respect.

125. See, e.g., COMTE-SPONVILLE, *supra* note 94, at 39 ("Temperance is that moderation which allows us to be masters of our pleasure instead of being its slaves. It is free enjoyment and hence better enjoyment, for it enjoys its own freedom as well.").

126. See *id.* at 31 ("Without prudence, the other virtues are merely good intentions that pave the way to hell.").

127. Brenda Almond, *Seeking Wisdom*, 72 PHIL. 417, 429 (1997).

128. *Id.* at 420.

129. See generally *supra* notes 118-122 and accompanying text.

130. See generally *supra* notes 113-117 and accompanying text.

131. See Andrew Bushwalker, *Hegel's Concept of Virtue*, 20 POL. THEORY 548, 549 (1992) ("Hegel presents civic virtue as a form of modern republicanism, one where genuine public spiritedness flows from reflection on the meaning of individual rights and liberties.").

A fuller case for the compatibility of the liberal values and basic virtues, and their promotion through formal education, will emerge below, after linking the virtues to perfectionism, and the virtues and perfectionism to genuine long-term cultural progress. Perfectionism and cultural progress, as cultivated through formal education, can then be further seen to be compatible with the basic liberal values.

For the moment, we can see that while the exercise of the virtues hardly guarantees every individual's life success,¹³² there is some relationship between genuine virtues and an admirable or flourishing life,¹³³ and perfectionism. And more broadly, the virtues and perfectionist development are essential to any collective life recognizable as involving sustained cultural progress.¹³⁴ The most famous attempt to link individual virtue, perfectionism, and the health of public life, though not to progress, is Plato's argument in *The Republic*.¹³⁵ Whatever the nature or coherence of Plato's broader argument,¹³⁶ our narrower argument here is that educational law

132. See GEITCH, *supra* notes 103-104 and accompanying text.

133. See HURSTHOUSE, *supra* note 7, at 167 ("A virtue is a character trait a human needs for *eudaimonia*, to flourish or live well."). See also *id.* at 21.

134. See *supra* note 100 and accompanying text. See also ADAMS, *supra* note 105, at 48 ("All of these traits [of conscientiousness, benevolence, courage, and restraint] perform functions that are, in one way or another, essential to human life. If such traits were lacking altogether in a group of people, they could not live together the sort of life characteristic of human beings.") (quoting JAMES WALLACE, *VIRTUES AND VICES* 161 (1978)). While the virtues thus contribute to social life and to progress, this does not mean that one could not admire the exercise of the virtues for their own sake. See, e.g., ADAMS, *supra* note 105, at 47-49.

135. For detailed discussion, see NORBERT BLOSSNER, *The City-Soul Analogy*, in *THE CAMBRIDGE COMPANION TO PLATO'S REPUBLIC* 345 (G.R.F. Ferrari ed. & trans. 2007). On Blossner's summary, "[t]o bring the individual into analogy with the city, Socrates . . . sketches a 'political' conception of the soul—a conception according to which forces within the soul work with or against each other in the same way as social groups do within the city." *Id.* at 366.

136. The merits, nature, and even the meaningfulness of Plato's argument are debated. Very roughly, the idea seems to be that justice or well-orderedness in the individual person is more or less analogous, if not identical, to justice or well-orderedness within the polis or state itself, given the somewhat similar structures comprising both person and state. For discussion and some contrasting assessments, see, for example, JULIA ANNAS, *AN INTRODUCTION TO PLATO'S REPUBLIC* 149-50 (1991) (suggesting each part of the soul as awkwardly containing each of the (other) parts of the soul as well); ERNEST BARKER, *THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE* 102 (1959) (minimizing even the distinction between justice in the individual and in the state); R.C. CROSS & A.D. WOOLLEY, *PLATO'S REPUBLIC: A PHILOSOPHICAL COMMENTARY* 131 (1966) (showing Plato as arguing from individual to city rather than from city to individual); TERENCE IRWIN, *PLATO'S ETHICS* 227 (1995) (demonstrating parallelism between justice in the individual and in the city); 2 WERNER JAEGER, *PAIDEIA: THE IDEALS OF GREEK CULTURE* 207 (Gilbert Highet trans., Oxford Univ. Press 1986) (1943) (discussing justice in the state as a magnified, more readily visible but structurally similar version of justice in the individual); RICHARD LEWIS NETTLESHIP, *LECTURES ON THE REPUBLIC OF PLATO* 68 (Forgotten Books 2003) (reprint of

can¹³⁷ and should do more to foster the basic virtues, perfectionist development, and cultural progress over time.

V. PERFECTIONISM AND ITS LEGITIMATE PROMOTION THROUGH THE EDUCATIONAL SYSTEM

The idea of perfectionism can be understood in a narrow sense, in which it is tied to fulfilling some unique, essential, and normatively unquestioned human nature. But perfectionism can also be understood in a broader sense without these controversial assumptions. In the narrower sense, perfectionism can be traced at least back to Aristotle's metaphysical biology,¹³⁸ and to religious writers, including Gregory of Nyssa.¹³⁹ As formulated by contemporary writers, in this narrow sense, perfectionism is "the claim that human well-being consists in the development and exercise of one's natural or essential capacities"¹⁴⁰ The leading contemporary perfectionist Thomas Hurka has similarly argued that "[c]ertain properties . . . constitute human nature or are definitive of humanity—they make humans human. The good life . . . develops these properties to a high degree or realizes what is central to human nature."¹⁴¹ This narrow sort of perfectionism can at least recognize that there can be many and varied ways of fulfilling the assumed essential human nature, and can thus endorse a form of pluralism.¹⁴²

A perfectionist in the broader sense, however, need not accept the idea that there is any unvarying, unique, essential, and normatively unquestioned human nature, whether that nature might be fulfillable in one or a plurality

1961 ed.) (1888) (stating the justice or courage of the state as "the justice or courage of the citizens as shown in their public capacity"); ERIC VOEGELIN, *PLATO* 70 (2000) (1957) ("[E]very polis writes large [but not universally] the type of man that is socially dominant in it.").

137. As Norbert Blossner expresses it, "any city will influence the souls of those who inhabit it. This happens both by deliberate plan, through laws and educational measures, as well as in an unplanned way, through exposure to exemplary values, norms, and modes of behavior." BLOSSNER, *supra* note 135, at 374-75. Actually, there is no reason why exposure to exemplary role models would have to be either unplanned, or distinct from the formal educational system.

138. See, e.g., JONATHAN LEAR, *ARISTOTLE: THE DESIRE TO UNDERSTAND* 191 (1988).

139. See GREGORY OF NYSSA, *THE LIFE OF MOSES* 6 (Abraham J. Malherbe trans., 1978) ("We should show great diligence not to fall away from the perfection which is attainable but to acquire as much as possible: To that extent let us make progress within the realm of what we seek. For the perfection of human nature consists perhaps in its very growth in goodness.").

140. Dale Dorsey, *Three Arguments for Perfectionism*, 44 *NOUS* 59, 59 (2010).

141. THOMAS HURKA, *PERFECTIONISM* 3 (1993).

142. See Philip Kitcher, *Essence and Perfection*, 110 *ETHICS* 59, 61 (1999).

of ways.¹⁴³ All persons might have valuable capacities or faculties that, whether essential to being distinctively human or not, invite free and equal development. Thus, a perfectionist in this broader sense need only believe that for any particular person, given that person's basic abilities, commitments, projects, and tastes, some choices and broader ways of living may be more fulfilling, more appropriate, more meaningful, and more broadly perfective of the person than others.¹⁴⁴

Perfectionism in this sense thus recognizes values beyond those of sheer subjective enjoyment or immediate intensity of preference. As the philosopher Philippa Foot has emphasized, following Aristotle, "we should not wish to continue in the pleasures of childhood at the cost of remaining a child."¹⁴⁵ All else equal, and given a free choice among reasonable options, we would not choose a life "devoted to the dogged collection of laundry lint, grass counting, or various base or unchallenging activities."¹⁴⁶ Typically, the virtues will thus be more perfective than their absence. Overcoming cowardice with learned courage is, in general, perfective.

A perfectionist in this broader sense may certainly be deeply committed to valuable forms of the basic liberal values of liberty, autonomy, and equality.¹⁴⁷ But the perfectionist will not be committed to the view that the state, particularly through education and the law of education, should strive to somehow approach official "neutrality" with regard to what makes up a good, virtuous, or perfective life for any person, or in the law's effects on all such conceptions.¹⁴⁸

143. See Michael Stocker, *Some Comments on Perfectionism*, 105 ETHICS 386, 386 (1995). For a sense of merely one form of challenge to narrow, essentialist perfectionism, based on evolutionary theory, see Kitcher, *supra* note 142, at 1.

144. See LEAR, *supra* note 138, at 191.

145. PHILIPPA FOOT, NATURAL GOODNESS 86 (2001) (quoting ARISTOTLE, NICOMACHEAN ETHICS book X, ch. 3 at 117a 1-3).

146. Dorsey, *supra* note 140, at 72 (citing the philosopher David O. Brink). The reference to base or unworthy activities, in general or for a given person, may or may not involve a belief by the evaluator that the activity is objectively wrong, or wrong as a matter of some ambitious metaethics.

147. See *infra* notes 154-171 and accompanying text. Note in particular the French Revolutionary commitment to not only liberty, equality, and fraternity, but to the perfectibility of the human person as well. See, e.g., ALEXIS DE TOCQUEVILLE, THE ANCIENT REGIME AND THE REVOLUTION 156-57 (Gerald Bevan trans., Penguin 2008) (1856).

148. For a useful rebuttal of the idea of state neutrality toward conceptions of the good life, see GEORGE SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS (1997). For formulations of the aspiration toward liberal neutrality regarding the good, see, for example, BRUCE ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE (1980); RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985); CHARLES E. LARIMORE, PATTERNS OF MORAL COMPLEXITY 46 (1987). For an attempt to split the difference between a limited perfectionism and liberal neutrality toward conceptions of the good, see Raphael Cohen-Almagor, *Between Neutrality and Perfectionism*, 7 CAN. J.L. & JURIS. 217 (1994).

In particular, the perfectionist may advocate law-based subsidies of not only the basic virtues,¹⁴⁹ but of the formal study of physics or languages, and not of laundry lint collecting or grass blade counting.¹⁵⁰ Educational accrediting bodies may validate the former, but not the latter. Loans and scholarships from tax funds may be available for the former, but not the latter. Of course, the perfectionist need not be committed to anything like minimizing nonperfective activities, whether through coercive or noncoercive means.

Quite understandably, perfectionism has often focused on the law of education. In the case of the leading nineteenth century perfectionist T.H. Green, this focus involved “establishing state-mandated and state-financed elementary education, and making higher education available to those who are qualified, regardless of economic background”¹⁵¹ Today, we may detect perfectionist strands in the rationales for, and the basic mission statements of, leading institutions of higher education¹⁵² and of schools in general;¹⁵³ but there is still ample room for additional elements of perfectionism in our current educational system, at any and all levels.

There is no reason why perfectionism in educational law, any more than the virtues, must conflict with attractive versions of liberal values, such as freedom, autonomy, equality, and pluralistic community. Professor Steven Wall has thus argued explicitly that “liberal perfectionism”¹⁵⁴ can be distinguished from anti-perfectionist liberalism.¹⁵⁵ Professor Wall’s version of liberal perfectionism emphasizes personal autonomy in particular.¹⁵⁶

149. See, e.g., *supra* notes 120-122 and accompanying text.

150. See Dorsey, *supra* note 146 and accompanying text.

151. DAVID O. BRINK, PERFECTIONISM AND THE COMMON GOOD: THEMES IN THE PHILOSOPHY OF T.H. GREEN 73 (2003). See also David Sidorsky, *Review of Perfectionism and the Common Good*, 116 MIND 148, 153 (2007) (showing Green as legitimizing such legal interventions, into education and elsewhere, beyond where J.S. Mill might have permitted, where such interventions contribute “to the individual’s capacity for self-realization”).

152. See *supra* notes 17-19 and accompanying text.

153. See *supra* notes 20-25 and accompanying text.

154. See STEVEN WALL, LIBERALISM, PERFECTIONISM AND RESTRAINT 2 (1998).

155. See *id.*

156. See *id.* at 2 n.3. See also John Gray, *Mill’s Liberalism and Liberalism’s Posterity*, 4 J. ETHICS 137 (2000) (classifying Mill himself as a perfectionist rather than as a utilitarian); Jeremy Waldron, *Autonomy and Perfectionism in Raz’s Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1127 (1989) (discussing Raz’s theory that political morality is based on three beliefs). We need take no position on any conflicts between forms of perfectionism and autonomy, or on how perfectionism and autonomy should be traded off against one another, as long as appropriate forms of perfectionism are available under which any such possible conflicts need not be severe. See, e.g., Simon Clarke, *Debate: State Paternalism, Neutrality and Perfectionism*, 14 J. POL. PHIL. 111 (2006) (citing a specific possible version of non-paternalistic perfectionism).

Professor Thomas Hurka's contemporary version of perfectionism similarly emphasizes the value of the free and uncoerced¹⁵⁷ pursuit of perfectionist values through government policy in general and through education in particular.¹⁵⁸ Not all forms and degrees of such encouragement need amount to coercion or compulsion,¹⁵⁹ or we could say that any system of mandatory education must recognize some rights, but not others. Even if an educational system (falsely) claims to deny any perfectionist elements, it must inescapably still promote certain dimensions of freedom at the inevitable expense of others.¹⁶⁰

Professor Hurka's version of perfectionism also seeks to promote crucial dimensions of equality as well.¹⁶¹ Perfectionism certainly need not involve the sacrifice of the supposed plodding masses to any purported elite.¹⁶² Anyone capable of benefiting from education, at whatever level, is presumably capable of voluntary self-realization, and of freely embracing more complex or meaningful projects.¹⁶³ Egalitarian versions of perfectionism, focusing in particular on appropriate educational policies, are thus certainly possible.¹⁶⁴

Of course, no form of perfectionism can equally promote all possible forms and conceptions of equality; egalitarians differ among themselves too significantly for that.¹⁶⁵ But the need to choose among different forms of

157. See HURKA, *supra* note 141, at 158-160.

158. See *id.*

159. See, e.g., Thomas L. Carson, *Book Review*, 55 PHIL. & PHENOMENOLOGICAL RES. 719, 721 (1995) (reviewing THOMAS HURKA, *PERFECTIONISM* (1993)). See also Peter de Marneffe, *Liberalism and Perfectionism*, 43 AM. J. JURIS. 99, 102 (1998) (noting that one possible version of perfectionism would be deontological perfectionism, which would focus on governmental protection of "those liberties necessary for the full development and exercise of the [virtue of the] capacity for practical reasoning").

160. See ISAIAH BERLIN, *LIBERTY* 166-216 (Henry Hardy ed., 2002) (providing a broad discussion of some inevitable tradeoffs).

161. See, e.g., HURKA, *supra* note 141, at 147 ("The best political act, institution, or government is that which most promotes the perfection of all humans."). See also Carson, *supra* note 159, at 721 (discussing Hurka's perfectionism).

162. See WALL, *supra* note 154, at 16 (citing Nietzsche and the early Bertrand Russell).

163. See Tim Mulgan, *Review of Perfectionism*, 103 MIND 550, 550 (1994).

164. See HURKA, *supra* note 141, at 147 & ch. 12; WALL, *supra* note 154, at 16; GEORGE SHER, *BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS* 243 (1997); Richard J. Arneson, *Perfectionism and Politics*, 111 ETHICS 37, 42 (2000) ("If perfectionism is to avoid recommending elitist policies, it must . . . assign[] significant positive moral value to the perfectionist achievements that the ordinary mass of human beings can feasibly attain."). *But see*, MICHAEL DELLA ROCCA, *SPINOZA* 181 (2008) (noting the apparent equation of goodness, power of acting, and perfection).

165. See generally, e.g., LARRY S. TEMKIN, *INEQUALITY* (1993); DOUGLAS RAE, *EQUALITIES* (1981); CAMBRIDGE UNIVERSITY PRESS, *SHOULD DIFFERENCES IN INCOME AND*

egalitarianism is plainly a problem any regulatory regime must face, and is hardly unique to perfectionism. Similarly, the relationships between important forms of liberty and equality are also contested, with some writers emphasizing basic conflicts,¹⁶⁶ and other writers emphasizing their mutual supportiveness.¹⁶⁷ This perennial problem, too, faces virtually any regulatory regime. There is nothing about a limited form of perfectionism in education, supplementary to some dominant rights paradigm, that must create more severe conflicts among, or within, valuable forms of liberty and equality.

A similar argument could easily be made for those who emphasize fraternity, community, or solidarity as a distinctively liberal values.¹⁶⁸ Again, there will be internal tensions between values, such as fraternity and other elements, such as liberty or autonomy, of liberalism,¹⁶⁹ so perfectionism as a more prominent component of a rights-dominated educational policy faces no distinctive problem in that respect. We can say in particular that leading perfectionists have recognized the complex relationship between individual perfectionism and group enhancement. Thus, it has been said, for example, that for T.H. Green, “self-realization also requires that others realize themselves, that is, that there is a degree of equivalence between self-realization and ‘the common good.’”¹⁷⁰ In this sense, certainly there need be

WEALTH MATTER? (Ellen Frankel Paul et al. eds., 2002); ST. MARTIN'S PRESS, THE IDEAL OF EQUALITY (Matthew Clayton & Andrew Williams eds., 2002).

166. See generally, e.g., FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY (1960); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); HOOVER INST. PRESS, LIBERTY AND EQUALITY (Tibor R. Machan ed., 2002); JAN NARVESON, THE LIBERTARIAN IDEAL (1988).

167. See generally, e.g., Ronald Dworkin, *Do Liberal Values Conflict?*, in THE LEGACY OF ISAIAH BERLIN 73 (Mark Lilla et al. eds., 2001); KAI NIELSEN, LIBERTY AND EQUALITY (1985), and classically, EDWARD BELLAMY, LOOKING BACKWARD (Daniel H. Borus ed., 1995). See also LEFT-LIBERTARIANISM AND ITS CRITICS: THE CONTEMPORARY DEBATE (Peter Vallentyne & Hillel Steiner eds., 2000).

168. See generally, e.g., MARIE VIANNEY BILGREN, SOLIDARITY: A PRINCIPLE, AN ATTITUDE, A DUTY? OR THE VIRTUE FOR AN INTERDEPENDENT WORLD (1999); HAUKE BRUNKHORST, SOLIDARITY: FROM CIVIC FRIENDSHIP TO GLOBAL LEGAL COMMUNITY (Jeffrey Flynn trans., 2005); THE CONCEPT OF COMMUNITY: READINGS WITH INTERPRETATIONS (David W. Minar & Scott Greer eds., 1969); DAVID HOLLENBACH, THE COMMON GOOD AND CHRISTIAN ETHICS (2002); WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989) (discussing communitarian critiques of “neutralist” liberalism in particular); DOUGLAS STURM, SOLIDARITY AND SUFFERING: TOWARD A POLITICS OF RELATIONALITY (1998); Christian Arnsperger & Yanis Varoufakis, *Toward a Theory of Solidarity*, 59 ERKENNTNIS 157 (2003); John Ladd, *The Idea of Community: An Ethical Exploration, Part I: The Search for an Elusive Concept*, 32 J. VALUE INQUIRY 5 (1998) (background on the general normative ideas).

169. See generally, e.g., KYMLICKA, *supra* note 168.

170. David Sidorsky, *Book Review*, 116 MIND 148, 151 (2007) (reviewing DAVID O. BRINK, PERFECTIONISM AND THE COMMON GOOD: THEMES IN THE PHILOSOPHY OF T.H. GREEN (2003)). Green himself is said to have interpreted Aristotle to recognize that one's own self-

no distinctive conflict between perfectionism in education law and the value of community, particularly to the extent that education can take on a group character.¹⁷¹

Beyond all these considerations, however, we cannot herein try to show, from scratch, the fundamental legitimacy of any concern for basic virtue, for any sort of perfectionism, or for cultural progress over time in educational policy. Nor can we herein establish some precisely optimal balance between the above concerns and a more purely rights-based approach to education that does not reduce to the former. Those are matters, on the one hand, of pure and basic philosophy, and on the other, of the specific application of detailed policy prescriptions under particular changing circumstances. We address one case example at some length in our concluding Section VII below.

We can advance the cause, though, merely by noting the moderation of our claim. We already have reason¹⁷² to doubt the irreconcilability of the legal promotion of better lives and proper consideration of the value of individual liberty,¹⁷³ but even the critics of a hard-line pursuit of perfectionism recognize that not all forms of legal perfectionism need amount to the subtly coercive imposition of qualities preferred by dominant groups.¹⁷⁴ Governments can instead, within the field of formal education and elsewhere, merely encourage and uncoercively facilitate a measure of perfectionism,¹⁷⁵ as by “conferring honours on creative and performing artists, and giving grants or loans to people who start community centres”¹⁷⁶

More broadly, we can say that even the presumably nonperfectionist philosopher John Rawls endorses at least a “thin” form of perfectionism that is not far from all that we need herein. Conscientious Rawlsian citizens cannot jeopardize their freedom by risking the official imposition of some

realization is dependent upon the self-realization of other people. *See id.* *See also* Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. U.L. REV. 241, 245-48 (2000) (comparing one form of perfectionism with standard measures of welfare maximization).

171. *See generally, e.g.*, L. ERLBAUM ASSOCIATES, WORK GROUP LEARNING: UNDERSTANDING, IMPROVING, & ASSESSING HOW GROUPS LEARN IN ORGANIZATIONS (Valerie Sessa & Manuel London eds., 2008).

172. *See supra* notes 154-160 and accompanying text.

173. *See* STEVEN LECCE, AGAINST PERFECTIONISM: DEFENDING LIBERAL NEUTRALITY 98 (2008) (discussing the development of a skeptical theme).

174. *See id.* at 117.

175. *See id.*

176. *Id.* Of course, as noncoercive governmental “nudges” proliferate and become more conspicuous or self-conscious, they may in some cases become more obtrusive, patronizing, alienating, grating, and infantilizing, and thus less effective. *See id.* *See also, generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

alien scheme of values,¹⁷⁷ but even a Rawlsian liberal contractarian society must take seriously, and must cultivate, encourage, and reinforce the virtues of justice and fidelity to one's word,¹⁷⁸ thereby promoting the typically perfectionist ideal of fulfilling one's crucial contractual commitments under normal circumstances.

Rawls' position on formal educational law is that universities in particular must not be coercively subsidized by those who do not compensatingly benefit from such institutions, or from their subsidization.¹⁷⁹ Rawls takes the main opposing perfectionist view to be that universities should be subsidized because they are "intrinsically valuable."¹⁸⁰ Now, it is possible that a moderate perfectionist might somehow think of a university or other educational institution as intrinsically valuable, in roughly the way we might think of a pure work of art, a sunset, or a spectacular view. But surely most moderate perfectionists would want to emphasize, among other things, the various ways in which a great university contributes to cultural life,¹⁸¹ in ways that cannot be neatly allocated to particular beneficiaries in an otherwise just society, as a matter of Rawlsian justice.¹⁸²

Rawls thus wishes to emphasize the ways in which educational institutions may contribute to the system of equal liberties, and to the basic goods of the least well-off among us.¹⁸³ The moderate perfectionist certainly need not disagree with this emphasis. For Rawls, this shows that tax subsidization is mostly a matter of justice itself, which depends on the social promotion of the virtue of justice.¹⁸⁴ We need take no issue with this. Still, unless we already notice and value the perfectionist effects of education on social life, we might fail to notice, or fail to much care about, the ways in which universities and other educational institutions contribute to promoting and strengthening our commitment to the specific Rawlsian principles of justice.¹⁸⁵ Again, in Rawlsian terms, we find no interesting incompatibilities

177. See JOHN RAWLS, *A THEORY OF JUSTICE* 288 (rev. ed. 1999). See also David McCabe, *Knowing about the Good: A Problem with Antiperfectionism*, 110 *ETHICS* 311, 311, 324, 328 (2000).

178. See RAWLS, *supra* note 177, at 288 (recognizing that we should promote the "principles of justice").

179. See *id.* at 291-92.

180. *Id.* at 291.

181. See *supra* notes 17-20 and accompanying text.

182. See RAWLS, *supra* note 177, at 292.

183. See *id.*

184. See *supra* note 178 and accompanying text.

185. See RAWLS, *supra* note 177, at 292. Cf. McCabe, *supra* note 177, at 335 ("By excluding conceptions of the good from political argument, antiperfectionism may make it harder for liberal states to advance important human goods . . ."); Onora O'Neill, *Book Review*, 91 *MIND* 625, 626 (1982) (reviewing VINIT HAKSAR, *EQUALITY, LIBERTY AND PERFECTIONISM* (1979) (statement of Professor Haksar) (arguing "that no plausible egalitarian political philosophy can dispense with perfectionist claims"))).

between sensible educational perfectionism, and a commitment to basic liberal values.

VI. CULTURAL PROGRESS OVER TIME AND ITS LEGITIMATE PROMOTION THROUGH THE EDUCATIONAL SYSTEM

However, we choose to define genuine progress at the broad cultural level, we find that cultural progress, like the basic virtues, and like perfectionist self-realization, cannot be exhausted in the law of education by the idea of rights. As we shall see, though,¹⁸⁶ standard views of progress again typically link up well with basic liberal values and liberal rights.

In the educational realm and elsewhere, the basic virtues, perfectionism, and cultural progress over time cannot be entirely separated. We see some of this inseparability in the Enlightenment optimist Condorcet:

[N]ature has set no term to the perfection of human faculties; . . . the perfectibility of man is truly indefinite; and . . . the progress of this perfectibility, from now onwards independent of any power that might wish to halt it, has no other limit than the duration of the globe on which nature has cast us [N]ature has joined together indissolubly the progress of knowledge and that of liberty, virtue and respect for the natural rights of man¹⁸⁷

Similarly, if less confidently, the contemporary scholar Charles Taylor recognizes a crucial modern “narrative of human self-realization, variously understood as the story of Progress, or Reason and Freedom, or Civilization or Decency or Human Rights; or as the coming to maturity of a nation or culture.”¹⁸⁸

Cultural progress is, as we shall see,¹⁸⁹ often linked to education and its reform. This is easily understandable. Educational policy has been linked to the acquisition and dissemination of knowledge, and thereby to produc-

186. See *infra* Part VI.

187. Condorcet, *Sketch for a Historical Picture of the Progress of the Human Mind*, in *SELECTED WRITINGS* 209, 211, 215 (Keith Michael Baker ed., 1976). See also J.B. BURY, *THE IDEA OF PROGRESS: AN INQUIRY INTO ITS ORIGIN AND GROWTH* 113 (2006) (discussing Condorcet on this point); GERTRUDE HIMMELFARB, *THE ROADS TO MODERNITY* 5-6 (2004) (providing a nuanced view that emphasizes the role of the social virtues of compassion, benevolence, and sympathy in the British Enlightenment).

188. CHARLES TAYLOR, *A SECULAR AGE* 716 (2007). Taylor himself recognizes, but is unconvinced by a number of postmodernist and other critiques of the general idea of progress. See *id.* at 716-17.

189. See *infra* Part VI.

tivity, or to progress in the form of real and genuinely culturally valuable economic growth.¹⁹⁰

It would be easy to argue that much of whatever we most plausibly call progress is commonly undersupplied by market forces alone, in the absence of thoughtful government regulation, investment, and subsidy. Certainly the financial incentives available to figures like Galileo, Newton, Maxwell, and Bohr to contribute to our understanding of the world bore not the slightest relation to the social benefits of their work over time, whether crudely measured in terms of the sales of goods and services crucially dependent upon their work, or in terms of the overall value of the resulting cultural progress itself.¹⁹¹ Nor do knowledge and progress creating institutions, such as Oxford University,¹⁹² whose contributions to the culture cannot fully be charged for and are in time imitated by others, have appropriate economic incentives, absent well-designed educational law and policy.¹⁹³

We do not mean to suggest that market exchange value should always override what might be called perfectionist—or cultural—progress value. But intelligently designed education law and policy can contribute to enhancing both of these forms of value. The current range of programs at the federal level, including general subsidies,¹⁹⁴ prizes and awards,¹⁹⁵ taxes and

190. See, e.g., ELHANAN HELPMAN, *THE MYSTERY OF ECONOMIC GROWTH* x-xi (2004); BRUCE SCHUMM, *DEEP DOWN THINGS: THE BREATHTAKING BEAUTY OF PARTICLE PHYSICS* 336 (2004) (“By some estimates (admittedly done by scientists), as much as half of the economic output of industrialized nations is a direct outgrowth of . . . fundamental scientific research.”); Robert C. Allen, *Progress and Poverty in Early Modern Europe*, 56 *ECON. HIST. REV.* 403, 404 (2003) (“Much recent theorizing has emphasized the importance of education and human capital accumulation for economic growth . . .”).

191. See, for example, the 3,000 ducat contract for Michelangelo’s contribution to the Sistine Chapel ceiling, as admired and appreciated over the succeeding five centuries. See *supra* note 50. The official response to some of Galileo’s work illustrates that government policy toward the production of knowledge is not always optimal, and should be thoughtfully designed. See, e.g., *THE GALILEO AFFAIR: A DOCUMENTARY HISTORY* (Maurice A. Finocchiaro ed., 1989); Ernan McMullin, *Galileo on Science and Scripture*, in *THE CAMBRIDGE COMPANION TO GALILEO* 271-347 (Peter Machamer ed., 1998); *THE CHURCH AND GALILEO* (Ernan McMullin ed., 2005).

192. See *supra* note 18 and accompanying text.

193. For discussion of positive externalities and public goods, see, for example, Joseph P. Tomain & Sidney A. Shapiro, *Analyzing Government Regulation*, 49 *ADMIN. L. REV.* 377, 408-10 (1997). As for the private economic sector more broadly, the incentives are often even more limited. See SCHUMM, *supra* note 190, at 336 (“The direct benefits of the knowledge we hope to gain [from fundamental physics research], in terms of technological advancement, are so far off in the future . . . that it would be folly for any private corporation to invest in this sort of research.”).

194. Consider the broad permissible scope of the federal government’s public library subsidy programs to promote certain values at the expense of others, whether through government speech itself or not. See *United States v. Am. Libr. Ass’n*, 539 U.S. 194 (2003) (upholding the Children’s Internet Protection Act’s conditional subsidy program). On the nature and permissible scope of government speech, in which the government itself is speak-

tax subsidies,¹⁹⁶ and grants and loans,¹⁹⁷ hardly exhausts the possibilities, in type and certainly in distribution and in scale or magnitude. Of course, it would be difficult to entirely disentangle all of these sorts of programs. But whether we do so or not, government educational policies have a wide range of possible effects. Particular official policy choices can have significant effects on the cultivation of virtue, perfectionism, or contributions toward long-term cultural progress achieved through education law.¹⁹⁸

ing, and not merely endorsing or appearing to endorse the speech of others, see *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009); *Rust v. Sullivan*, 500 U.S. 173 (1991); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Rebecca Tanglen, *Local Decisions, National Impact: Why the Public School Textbook Selection Process Should Be Viewpoint-Neutral*, 78 U. COLO. L. REV. 1017 (2007). See also R. George Wright, *School-Sponsored Speech and the Surprising Case For Viewpoint-Based Regulation*, 31 S. ILL. U. L.J. 175 (2007). For an interesting and useful distinction between government as speaker and government as educator, see Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 991-92 (2009).

195. For a sense of the broadly permissible scope of government discretion, even in the light of the Free Speech Clause, to adopt particular criteria for official prizes and awards, within or without the scope of formal institutional education processes, see, for example, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). For discussion, see Randall P. Bezanson, *Performing Art: National Endowment for the Arts v. Finley*, 60 FED. COMM. L.J. 535 (2008).

196. See, e.g., Andrew D. Pike, *No Wealthy Parent Left Behind: An Analysis of Tax Subsidies for Higher Education*, 56 AM. U.L. REV. 1229 (2007).

197. See, e.g., C. Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 34 J.C. & U.L. 79 (2007); Sima J. Gandhi, *Understanding Students from a Behavioral Economics Perspective: How Accelerating Student Loan Subsidies Generates More Bang for the Buck*, 17 KAN. J.L. & PUB. POL'Y 130 (2007-2008).

198. Consider, merely for example, that rational students might opt for one course of study over another based on considerations of student loan availability, size of student loans, interest rates, deductibility and other tax treatments, repayment scheduling, deferrals, exemptions, and bankruptcy dischargeability, or even the possibility of repayment in the form of foregone retirement income. For a more radical approach not explicitly focused on funding for education in particular, see BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999) (substantial financial stake made available to qualified young adults). It is unclear whether the latter proposal is best understood as recognizing preexisting rights, or as promoting basic liberal values and other cultural values more broadly.

It also seems likely that the typical size of student loans, credit availability, subsidization of campus housing and other basic student expenses, and other considerations might affect the percentage of time that students allocate to working for money, to public service or unpaid internships, to various forms of entertainment, and to actual study time. It may be that various factors influence average study time. But there are no grounds for assuming that average study time remains culturally fixed across generations, or fixed across cultures, and that educational law and policy, beyond a focus on rights, is powerless to affect the extent to which students actually study. For discussion, see Philip Babcock & Mindy Marks, *Leisure College, USA*, AMERICAN ENTERPRISE INSTITUTE (November 10, 2008), www.econ.ucsb.edu/~babcock/LeisureCollege.pdf (documenting the fifty percent fall in four year college full time student study time from 1961 to 2003, virtually across the board, in-

The idea of progress in general and its substantive nature and value are of course controversial. The idea of progress has not naturally occurred to human beings; what we commonly think of as cultural progress is associated with “only the last six or seven of our 100,000 generations.”¹⁹⁹ But within that remarkably short time frame, humanity’s collective capabilities, creative and destructive, have in some respects multiplied astonishingly.

Consider, for example, how our expectations and our aspirations for medicine have recently changed. A leading historian of medicine has concluded:

For centuries, the medical enterprise was too feeble to attract radical critiques. From Cato to Chekhov, medicine had its mockers; yet most who could, called the doctor when sick. People did not have high expectations, and when the doctor typically achieved little, they did not blame him much. Medicine was a profession, but it carried little prestige or power. All bowed before death.²⁰⁰

Contrast the undeniable, if incomplete, accomplishments of and expectations for contemporary university-associated medical and scientific research. The possibilities for creative innovation and crucial discovery within the field of medicine over the next century, and the dissemination of the benefits of genuine medical and pharmaceutical innovation and creativity, are fascinating, but are plainly dependent upon prudent and far-sighted government policies.

This is not to disparage progress outside of the technical and scientific realm.²⁰¹ More broadly, cultural progress on all fronts is both a cause and a consequence of “the creation of an educational system capable of training

cluding for those who worked during college); DEREK BOK, *OUR UNDERACHIEVING COLLEGES: A CANDID LOOK AT HOW MUCH STUDENTS LEARN AND WHY THEY SHOULD BE LEARNING MORE* (2005); DECLINING BY DEGREES: *HIGHER EDUCATION AT RISK* (Richard H. Hersh & John Merrow eds., 2005); JEAN M. TWENGE, *GENERATION ME: WHY TODAY’S YOUNG AMERICANS ARE MORE CONFIDENT, ASSERTIVE, ENTITLED—AND MORE MISERABLE THAN EVER BEFORE* (2006); and in the realm of fiction, see TOM WOLFE, *I AM CHARLOTTE SIMMONS* (2004).

199. RONALD WRIGHT, *A SHORT HISTORY OF PROGRESS* 13 (2004). Thus the plausibility of the argument that “[v]ery likely, we are still confused beginners with very wrong mental pictures, and ultimate reality remains far beyond our grasp.” LEONARD SUSSKIND, *THE BLACK HOLE WAR* 441 (2008). More immediately, see MICHAEL BROOKS, *13 THINGS THAT DON’T MAKE SENSE* (2008) (discussing a range of currently unresolved anomalies and apparently fundamental problems across the sciences).

200. ROY PORTER, *THE GREATEST BENEFIT TO MANKIND: A MEDICAL HISTORY OF HUMANITY* 716 (1997).

201. As a particularly credible source, see RICHARD P. FEYNMAN, *THE MEANING OF IT ALL: THOUGHTS OF A CITIZEN-SCIENTIST* 118 (1998).

and socializing the children of the society to a level compatible with their capacities and best contemporary knowledge”²⁰²

Revising the educational process, including its focus, content, and then later its accessibility or its direct beneficiaries, was deemed central by Enlightenment and even pre-Enlightenment figures. Francis Bacon, for example, opined that “no great progress can be made in the doctrines and thinking of the sciences, nor can they be applied to a wide range of works, by the methods commonly in use.”²⁰³ Progress, according to Bacon, requires a shift from deductive logic toward inductive generalizations based in disinterested and publicly disseminated experimentation.²⁰⁴

Even in the period before the Enlightenment itself, the idea of progress in general was celebrated. Of that period, the historian Paul Hazard writes:

What a sense of triumph, of joyous expectancy, in that one word, Progress! It brought with it a feeling of conscious pride, that feeling which makes life so much more easy to live; and it opened up vistas of a future which, instead of differing from the present, was to prove, rather, its complement and its crown.²⁰⁵

Of the ensuing Enlightenment period itself, Ernst Cassirer writes that “[p]erhaps no other century is so completely permeated by the idea of intellectual progress as that of the Enlightenment.”²⁰⁶ For the representatives of the Enlightenment, “[s]ince the present is so much better than the past, will not the future be much better than the present?”²⁰⁷

202. DAVID S. LANDES, *THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT* 6 (2d ed. 2003).

203. FRANCIS BACON, *THE NEW ORGANON*, § 128 at 98-99 (Lisa Jardine & Michael Silverthorne eds., Cambridge Univ. Press 2000) (1620). From a later period, see also COMTE, *supra* note 86, at 24.

204. See BACON, *supra* note 203, § 98 at 81. See also MONTESQUIEU, *THE PERSIAN LETTERS* XV (George R. Healy trans., Bobbs Merrill 1964) (1721) (discussing Montesquieu as seeking the underlying universals and absolutes of natural law in an empirical investigation into the diversities and relativities of culture); G.W.F. HEGEL, *REASON IN HISTORY* 95 (Robert S. Hartman trans., 1953) (1837) (discussing historical development as in a sense preserving what has been transcended).

205. PAUL HAZARD, *THE EUROPEAN MIND 1680-1715* 317 (J. Lewis May trans., 1963) (1935).

206. ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 5 (Fritz C.A. Koelln & James P. Pettegrove trans., 1951) (1932). See also *id.* at 47. More specifically, for Mozart, Frederick the Great, and C.P.E. Bach, “[t]he mind and universe being of the same orderly structure, and our brains now freed of religious nonsense, the answers to all questions and cures to all ills could now be discovered through the clear, unfettered exercise of reason.” JAMES R. GAINES, *EVENING IN THE PALACE OF REASON* 257 (2005).

207. CARL L. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHERS* 102 (1974) (1932). See also CASSIRER, *supra* note 206 at 30-31, 102 on En-

Some portion of the envisioned broad Enlightenment progress takes the form of progress as well in basic virtue. The French Philosopher Turgot, for example, wrote in 1750 that “[s]elf-interest, ambition, vainglory, perpetually change the scene of the world, inundate the earth with blood. Yet in the midst of their ravages manners are gradually softened, the human mind takes enlightenment”²⁰⁸

Of the major Enlightenment writers, Immanuel Kant²⁰⁹ and the—in some respects—atypical Jean-Jacques Rousseau²¹⁰ were most explicitly interested in matters of formal education. But education in one form or another seems central to the Kantian and broader Enlightenment project of bringing adults to a position of competence, independent judgment, and autonomy as responsible actors.²¹¹

We have neither the competency nor the space here to recount post-Enlightenment conceptions, or even all the most crucial examples, of cultural progress crucially dependent upon the educational system. We briefly address some of the more common critiques of progress, in general and from our contemporary vantage point, below.²¹² But without presuming unduly on our own controversial conceptions of progress, we can at least briefly illustrate some future possibilities for progress.

lightenment belief in human perfectibility. For a similar sentiment from a half century later, consider ALFRED, LORD TENNYSON, LOCKSLEY HALL, *available at* www.bartleby.com/42/636/html (1842) (last visited May 30, 2009) (“[M]en the workers, ever reaping something new: That which they have done but the earnest of things that they shall do”) (lines 118-119).

208. A.R.J. Turgot, *On Progress*, in THE PORTABLE ENLIGHTENMENT READER 361, 362 (Isaac Kramnick ed., Penguin 1995) (1750). For different Enlightenment slants on the uses and limits of the pursuit of individual self-interest, see BERNARD DE MANDEVILLE, THE FABLE OF THE BEES: OR PRIVATE VICES, PUBLIC BENEFITS (Penguin 1989) (1732); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Kessinger Pub. 2004) (1759).

209. See *supra* notes 84-86 and accompanying text.

210. See JEAN JACQUES ROUSSEAU, EMILE (Barbara Foxley trans., reprint ed. 1977) (1762) (focusing on the inculcation of a healthy set of virtues based on healthy natural inclinations).

211. See PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION 3 (1966) (discussing Kant as focusing on “freedom to realize one’s talents,” which would seem to realistically implicate education: “Kant saw the Enlightenment as man’s claim to be recognized as an adult, responsible being.”). For a more homespun endorsement of the value of education to progress from a Scottish Enlightenment figure and Kant’s contemporary, see Adam Ferguson, *The Progressive Character of Human Nature*, in THE PORTABLE ENLIGHTENMENT READER 380, 382 (Isaac Kramnick ed., 1995) (“The generation, in which there is no desire to know more or practice better than its predecessors, will probably neither know so much nor practice so well. And the decline of successive generations, under this wane of intellectual ability, is not less certain than the progress made under the operation of a more active and forward disposition.”).

212. See *infra* Part VI.

Let us consider, almost at random, merely a few aspects of the possible future of medicine, and of progress in medical technology. Medicine has come a long way recently, and holds the potential to come much further, in ways that would enhance human dignity if encouraged by appropriate incentives for creativity. The familiarity of the advances, and obstacles remaining, in medical technology should not dull our vivid sense of both the advances and the obstacles. Merely for example, we now have “neural implants for Parkinson’s disease and cochlear implants for deafness. There’s a new generation of cochlear implants coming out that provide one thousand points of frequency resolution and will allow deaf people to hear music for the first time.”²¹³ More speculatively and distantly, some anticipate nanobots able to interact in both directions with biological neurons in general, and with brain cells in particular.²¹⁴

Medical nanotechnologies, again setting aside momentarily the risks and uncertainties, may offer significant advances in monitoring and diagnosis²¹⁵ and in the actual treatment, repair, and replacement of damaged or diseased tissues.²¹⁶ Consider the possibility of progress against the indignities of aging faced variously by all economic classes. More broadly, some specialists are willing to predict:

[O]vercoming the refusal of adult nerve cells to regenerate so as to be able to treat spinal injuries or autoimmune diseases like multiple sclerosis, or even brain damage itself; better drugs to relieve . . . depression or . . . schizophrenia; gene-based therapies for Huntington’s disease and other neurological disorders.²¹⁷

As well, there may be help on the cost side. It has been suggested, for example, that “[t]he ability of artificial immune systems to discover biomolecules that counter unusual antigens, combined with the technological au-

213. Ray Kurzweil, *The Singularity*, in *SCIENCE AT THE EDGE* 295, 300 (John Brockman ed., 2008).

214. *See id.* at 301.

215. *See* RICHARD A.L. JONES, *SOFT MACHINES: NANOTECHNOLOGY AND LIFE* 217 (2004).

216. *See id.* *See also* JOHN LUKACS, *LAST RITES* 22 (2009).

217. STEVEN ROSE, *THE FUTURE OF THE BRAIN: THE PROMISE AND PERIL OF TOMORROW’S NEUROSCIENCE* 266 (2005). Rose is here speaking mainly in the voice of a number of his colleagues; Rose himself is concerned over the possibilities for mind-manipulation, an artificially tranquilized and externally indifferent society, the restriction of the idea of human agency, and a societal move “beyond freedom and dignity.” *See id.* The implied reference is to the behaviorist. B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971). For further discussion as to possible limits on the progress attainable through a narrow scientific materialism, see JAMES LE FANU, *WHY US? HOW SCIENCE REDISCOVERED THE MYSTERY OF OURSELVES* (2009).

tomation of drug design and production, will finally bring drug costs down, even in small markets²¹⁸

Medical progress is commonly assumed as well to encompass far more than what we would think of as the prevention and cure of disease, as in the now common and expanding range of vaccines. At some debatable point, medical and technological procedures transcend the therapeutic, and enter the realm of affirmative enhancement of familiar baseline capabilities.²¹⁹ Thus it is said with respect to healthy persons in particular that “it may only be a matter of time before we are able to improve a person’s memory, concentration, or IQ through genetic manipulation.”²²⁰

While it is certainly possible, even likely, that some of the currently most promising pathways to dramatic medical advances may not pan out, there may be alternative routes to similarly dramatic results. It is suggested, for example, that “we²²¹ will²²² eventually adopt brain enhancements. . . . We will use nanotechnology to support our biological systems. And . . . the capabilities of the implants and support technology we use will far outstrip our own biological functionality.”²²³

Of course medical and related technologies, as varied and important as they are, amount only to a single dimension of a potentially broad range of cultural progress.²²⁴ Most such progress will at some stage be crucially de-

218. John M. Holland, *What Is to Come and How to Predict It*, in *THE NEXT FIFTY YEARS* 170, 181 (John Brockman ed., 2002).

219. See, e.g., R. George Wright, *Personhood 2.0: Enhanced and Unenhanced Persons and the Equal Protection of the Laws*, 23 QLR 1047, 1050-53 (2005); ALLEN BUCHANAN, DAN W. BROCK, NORMAN DANIELS & DANIEL WIKLER, *FROM CHANCE TO CHOICE: GENETICS TO JUSTICE* 98 (2001).

220. MAXWELL J. MEHLMAN & JEFFREY R. BOTKIN, *ACCESS TO THE GENOME: THE CHALLENGE TO EQUALITY* 90 (1998).

221. The reference here to ‘we’ raises implicit issues of equality of access discussed in Wright, *supra* note 219. See also SOLOMON R. BENATAR, *THE GENETIC REVOLUTION AND HUMAN RIGHTS* 159, 171 (Justine Burley ed., 1999) (concerns regarding eventual societal divisions with a “biologic underclass”); MEHLMAN & BOTKIN, *supra* note 220; MICHAEL J. SANDEL, *THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING* 89 (2007) (“[T]he explosion of responsibility for our own fate, and that of our children, may diminish our sense of solidarity with those less fortunate than ourselves.”).

222. Similarly, the reference here to ‘will’ raises implicit issues of genuine freedom in choosing to adopt such techniques. See the sources cited *supra* note 221.

223. BRIAN CLEGG, *UPGRADE ME: OUR AMAZING JOURNEY TO HUMAN 2.0* 280 (2008). See also ANDY CLARK, *NATURAL BORN CYBORGS: MINDS, TECHNOLOGIES, AND THE FUTURE OF HUMAN INTELLIGENCE* 3 (2003). For an even less time-constrained series of visions of possible progress, see the overly ambitiously entitled *YEAR MILLION: SCIENCE AT THE FAR EDGE OF KNOWLEDGE* (Damien Broderick ed., 2008).

224. Extending only modestly beyond the disease paradigm, consider that there are “billions of people who suffer from disease and poverty, and we have the opportunity to overcome those problems through technological advances.” Kurzweil, *supra* note 213, at 309.

pendent for its rate and direction and duration on formal educational law and policy. And while various rights claims will doubtless play important roles in the relevant educational law and policy, it is difficult to see either the desire for broad progress, or principled or pragmatic resistance to alleged progress, as exhausted by the vocabularies of rights. There is more to progress, or to its redefinition or constraint, than rights claims and recognition. To say that anyone has any sort of right to be educated in such a way, for example, as to increase that person's chances of effectively interfacing vocally with wall computers²²⁵ is to add little to the underlying discussion. When it comes to such matters, we can talk narrowly and superficially in terms of rights, but the most sensible legal policies must also reflect values, such as virtue, perfectionism, sustained progress, and the liberal values insofar as they are not entirely reducible to rights as well.

The relationship between cultural progress through education, and the basic liberal value of liberty, has often been emphasized.²²⁶ For Kant, education clearly involved a process of initial guidance, but the aim of the Enlightenment itself was to educate adults into a liberated independence from the moral or intellectual authority of others.²²⁷ For the Enlightenment and beyond, including for Karl Marx,²²⁸ progress became the "developmental context"²²⁹ for liberty, as well as for equality and democracy.²³⁰ Education, progress, and emancipation intertwine in Jacques Barzun's conclusion that the Eighteenth Century:

[W]as confident that the new knowledge, the fullness of knowledge, was in its grasp and was a means of EMANCIPATION. Confidence came from the visible progress in scientific thought. Science was the application of reason to all questions, no matter what tradition might have

225. See Holland, *supra* note 218, at 206, 208.

226. See *supra* notes 206 & 211 for examples of the language of liberation.

227. See Immanuel Kant, *Answer to the Question: What Is Enlightenment?*, in BASIC WRITINGS OF KANT 135, 136 (Allen W. Wood ed., Thomas K. Abbott trans. New York: The Modern Library 2001) (1784).

228. For discussions of Marx on the idea of progress, see, for example, SHLOMO AVINERI, *THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX* 220-21 (1970); JON ELSTER, *AN INTRODUCTION TO KARL MARX* 117 (1986); JONATHAN WOLFF, *WHY READ MARX?* 47 (2003) ("[I]liberal political emancipation, in the end, makes things even worse in some respects, even though it does represent progress in many ways."); and ultimately, KARL MARX, *The German Ideology*, in *THE PORTABLE KARL MARX* 162, 177 (Eugene Kamenka ed., Penguin Books 1983) (1845).

229. ROBERT NISBET, *HISTORY OF THE IDEA OF PROGRESS* 171 (2008 ed.) (1980).

230. See *id.* In particular, see G.W.F. HEGEL, *THE PHILOSOPHY OF HISTORY* 456 (Dover ed., J. Sibree trans., 2004) (1837) ("[T]he History of the World is nothing but the development of the Idea of Freedom."). See Daniel Berthold-Bond, *Hegel's Eschatological Vision: Does History Have a Future?*, 27 *HISTORY & THEORY* 14 (1988).

handed down. . . . The goal of exploring nature and mind and broadcasting results was to make Man everywhere of one mind, rational and humane.²³¹

Through mutually reinforcing elements of progress, education, and increasing liberty, it has become possible to argue that “today’s ordinary Western citizen is, in sixteenth-century terms, a lord: a possessor of rights, entitlements, opportunities and resources that only an aristocrat of that earlier period could hope for.”²³²

Progress, education, and crucial forms of the basic liberal value of equality have been similarly linked together. Condorcet emphasized “the abolition of inequality between nations,”²³³ the “progress of equality within each nation,”²³⁴ and “the true perfection of mankind.”²³⁵ At nearly the same time, the English radical William Godwin traced “in the progress of modern Europe from barbarism to refinement, a tendency towards equalization of conditions.”²³⁶ For Godwin, as Europe has progressed, “learning proved that the low-born were capable of surpassing their lords.”²³⁷ In more vivid terms, the Victorian critic Matthew Arnold wrote that “all our fellowmen, in the East of London and elsewhere, we must take along with us in the progress toward perfection, if we ourselves, as we profess, want to be per-

231. JACQUES BARZUN, *FROM DAWN TO DECADENCE: 1500 TO THE PRESENT: 500 YEARS OF WESTERN CULTURAL LIFE* 359 (2000). For a time scale akin to Barzun’s, see JOHN LUKACS, *LAST RITES* 100 (2009) (“[W]e . . . have now lived not only in the twilight but beyond the end of an entire great historical epoch, of the great European and bourgeois age of about five hundred years . . .”).

232. A.C. GRAYLING, *TOWARD THE LIGHT OF LIBERTY: THE STRUGGLES FOR FREEDOM AND RIGHTS THAT MADE THE MODERN WESTERN WORLD 2* (2007). We should note that even if progress were nearly synonymous with rights, which is far from true, it would not follow that the content, structure, or design of education, as controlled by law, should be invariably dominated by a focus on rights. *See id.* at 2-4.

233. Condorcet, *Sketch for a Historical Picture of the Progress of the Human Mind*, in *SELECTED WRITINGS* 209, 258 (Keith Michael Baker ed., Macmillan Publishing 1976) (1793).

234. *Id.*

235. *Id.* More sweepingly, *see id.* at 215 (“[N]ature has joined together indissolubly the progress of knowledge and that of liberty, virtue and respect for the natural rights of man . . .”).

236. WILLIAM GODWIN, *ENQUIRY CONCERNING POLITICAL JUSTICE* 309 (K. Codell Carter ed., Univ. of Toronto 1971) (1798). *See also* Percy Bysshe Shelley, *Prometheus Unbound*, act III, scene III, lines 193-197 (1820).

237. GODWIN, *supra* note 236, at 309. It is worth noting that some of the severest critics of the optimism of Condorcet and Godwin, such as Thomas Malthus, nonetheless emphasized the importance of education, including education into virtue. *See* Donald Winch, *Introduction* to THOMAS R. MALTHUS, *AN ESSAY ON THE PRINCIPLE OF POPULATION* vii, ix (Donald Winch ed., 1992) (1798).

fect”²³⁸ In these expressions of equality as an element of progress, we also see further elements of the liberal values of solidarity, fraternity, community, and sympathy.²³⁹

Of course, the meaning and value of progress—even its possibility—have long been contested. We can hardly address fairly even the most general of such concerns herein. But the most sensible responses to the general critiques of progress normally involve conceding much of their substance, while insisting that we maintain balance and perspective. We need only retain a sense of proportion, and a mature sense of judgment. Progress as a goal of education, and of the law and policy of education, can only be abandoned at an entirely disproportionate cost. This is true especially if we are open to maturing understandings of what constitutes genuine progress in the first place.

Certainly, a number of the Enlightenment theorists had little sense of how a reformed and expanded system of education might unexpectedly lead cultures down blind alleys.²⁴⁰ But even for Enlightenment thinkers, there were contemporary warnings, as in Rousseau’s exaggerated and self-undermining assertion that “our minds have been corrupted in proportion as the arts and sciences have improved.”²⁴¹ Critics recognized more insightfully that progress itself led to a certain dissatisfaction and a restless, perhaps insatiable desire for further progress.²⁴²

In part, the dissatisfaction resulting from progress itself is desirable and ultimately promotive of human dignity. And to some degree, such dissatisfaction may reflect merely the slower than ideal pace or the current

238. MATTHEW ARNOLD, *CULTURE AND ANARCHY* 141 (Oxford World Classic ed. 2006) (1869).

239. See *supra* notes 234-238 and accompanying text. See also ARNOLD, *supra* note 238, at 48 (on the “ideal of human perfection” as manifesting “increased sympathy”); William Morris, *How I Became a Socialist*, in *NEWS FROM NOWHERE AND OTHER WRITINGS* 379, 379 (Clive Wilmer ed., Penguin Books 1993) (1894) (linking “equality of condition” to “commonwealth” in the sense that “harm to one would mean harm to all”).

240. See JOHN PASSMORE, *THE PERFECTIBILITY OF MAN* 190 (1970).

241. JEAN JACQUES ROUSSEAU, *DISCOURSE ON THE ARTS AND SCIENCES*, in *THE SOCIAL CONTRACT AND DISCOURSES* 144, 150 (G.D.H. Cole trans., Noach Publishing 1950) (1750). See also *id.* at 157 (“nature would have preserved [humankind] from science, as a mother snatches a dangerous weapon from the hands of her child.”). But cf. JAMES MADISON, *WRITINGS* 507 (Library of America ed. 1999) (“Had Rousseau lived to see the rapid progress of reason and reformation, which the present day exhibits, the philanthropy which dictated his project would find rich enjoyment in the scene before him . . .”).

242. See Nathaniel Hawthorne, *The Birthmark*, in *HAWTHORNE’S SHORT STORIES* 147, 159 (Newton Arvin ed., 1946) (1843); PRESIDENT’S COUNCIL ON BIOETHICS, *BEYOND THERAPY: BIOTECHNOLOGY AND THE PURSUIT OF HAPPINESS* 18-19 (2003); ERIC COHEN, *IN THE SHADOW OF PROGRESS: BEING HUMAN IN THE AGE OF TECHNOLOGY* 18 (2008) (“Infinite progress also means infinite discontent, as man is left in a state of eternal becoming with no end.”).

state of uneven progress. Contemporary pharmacology's limited progress, for example, has raised popular expectations, while remaining, at least for a time, unable to genuinely or universally treat a number of common, serious mental illnesses.²⁴³ Contemporary genetics can in some cases establish that we are at unusual risk for a specific disease, while as yet offering no preventive treatment.²⁴⁴ Medicine's success in extending the duration of life has, at least for the moment, worsened the frequency and severity of diseases associated mainly with age. But what reason do we have to think of these admittedly unfortunate circumstances as inescapably permanent? And, in the meantime, continuing progress in understanding human physiology, genetics, and disease seems to be required by a sense of the creative dignity of humanity and of the person. To abandon the pursuit of genuine cultural progress is thus to abandon an important element of human dignity.

Critiques of progress have occasionally extended beyond exaggeration to sheer hyperbole. The pessimist philosopher Arthur Schopenhauer, for example, referred to a vision in which "we could all, without work or effort, cram ourselves, swill, propagate, and drop dead [as] . . . a paraphrase of . . . the goal of the 'unending progress of mankind . . .'"²⁴⁵ Or consider the message from the counterpart of Nietzsche's *ubermensch*, the "last man": "We have invented happiness,' say the last men, and they blink . . . one needs warmth . . . [A]nd much poison in the end, for an agreeable death."²⁴⁶

Such critiques of progress, in their overstatement, still invite us to learn what we can from them, and to appreciate their elements of insight, without going so far as to conclude that the idea of progress through education should be minimized or abandoned. Consider John Ruskin's observation that under the developing market economy, "the persons who become

243. See PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 242, at 18.

244. See *id.*

245. ARTHUR SCHOPENHAUER, *ESSAYS AND APHORISMS* 154 (R.J. Hollingdale trans., Penguin Books 1970) (1851). For further discussion of Schopenhauer on pessimism, suffering, and lack of progress in virtue, see ARTHUR SCHOPENHAUER, *ON THE BASIS OF MORALITY* § 20, at 190 (E.F.J. Payne trans., Berghahn Books 1995) (1841); FREDERICK COPLESTON, *ARTHUR SCHOPENHAUER: PHILOSOPHER OF PESSIMISM* (1946); BRYAN MAGEE, *THE PHILOSOPHY OF SCHOPENHAUER* 13 (1997); Christopher Janaway, *Schopenhauer's Pessimism*, in *THE CAMBRIDGE COMPANION TO SCHOPENHAUER* 318 (Christopher Janaway ed., 2000).

246. FREDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA: A BOOK FOR NONE AND ALL* 17-18 (Walter Kaufmann trans., Penguin Books 1977) (1885). Cf. OSWALD SPENGLER, *THE DECLINE OF THE WEST* 187 (Arthur Helps & Charles Francis Atkinson trans., Vintage abridged ed., 2006) (1918 & 1923) (discussing Nietzsche's "criticism of decadence is unanswerable, but his theory of the Superman is a castle in the air"). For a socialist view very loosely akin to Nietzsche's, in viewing Enlightenment progressivism as a bourgeois democratic construct to be demolished, see GEORGE SOREL, *THE ILLUSIONS OF PROGRESS* 152 (John & Charlotte Stanley trans., 1969) (1908).

rich are, generally speaking, industrious, resolute, proud, covetous, prompt, methodical, sensible, unimaginitive, insensitive, and ignorant.”²⁴⁷ Is this mixed picture utterly inevitable? Is it unalterable even in detail? Why not, then, a broad education focusing appropriately on developing the capacities of the imagination, sensitivity, and replacing ignorance with knowledge?

The fear of technical dominance and the loss of liberty under ill-named “progress” is certainly understandable.²⁴⁸ But even as communications technologies of various sorts proliferate, there remains a valuable leavening element of not merely late adopters, but of principled nonadopters. In general, we need not persist in the naïve illusions of those, who perhaps originally with some excuse, idolized technical progress.²⁴⁹ We must choose for or against competing ideas of progress based in part on whether a given understanding of progress enhances freedom more than it sacrifices our most valuable forms of freedom.²⁵⁰ These judgments require the virtue of practical wisdom and justice.

What of the broader argument, though, that progress, as commonly understood, contains the seeds of its own destruction? What if the progress itself, or the necessary means of delivering progress,²⁵¹ are unsustainable²⁵²

247. JOHN RUSKIN, *UNTO THIS LAST AND OTHER WRITINGS* 212 (Penguin rev. ed. 1997) (1862).

248. See SAMUEL BUTLER, *EREWON* 208 (Penguin reprint ed. 1985) (1872) (“Is it not plain that the machines are gaining ground upon us, when we reflect on the increasing number of those who are bound down to them as slaves, and of those who devote their whole souls to the advancement of the mechanical kingdom?”). See also the remarkably perceptive JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* (Knopf ed., 1964) (1954); ANTHONY T. KRONMAN, *EDUCATION’S END* 229-30 (2007). For classic technological dystopias, see MARY SHELLEY, *FRANKENSTEIN* (Maurice Hindle ed., 2003) (1818); ALDOUS HUXLEY, *BRAVE NEW WORLD* (Harper Perennial ed. 2006) (1932).

249. Karl Polanyi writes that with the Industrial Revolution, “the new creed was utterly materialistic and believed that all human problems could be solved given an unlimited amount of material commodities.” KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 40 (1957 ed.) (1944).

250. For discussions of the valuation of inevitably conflicting forms of freedom, see STANLEY I. BENN, *A THEORY OF FREEDOM* (1988); IAN CARTER, *A MEASURE OF FREEDOM* (1999); MATTHEW H. KRAMER, *THE QUALITY OF FREEDOM* (2003); KRISTJAN KRISTJANSSON, *SOCIAL FREEDOM: THE RESPONSIBILITY VIEW* (1996); FELIX OPPENHEIM, *DIMENSIONS OF FREEDOM* (1961); CHRISTINE SWANTON, *FREEDOM: A COHERENCE THEORY* (1992).

251. See, e.g., JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (Harper Colophon ed., 1975) (1942); DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1996 ed.) (1976).

252. For background, see ANDRES R. EDWARD, *THE SUSTAINABILITY REVOLUTION: PORTRAIT OF A PARADIGM SHIFT* (2005). The roots of much contemporary sustainability theory lie not only in principles of conservation and environmentalism, but in the “stationary state” economics of John Stuart Mill. See JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY AND CHAPTERS ON SOCIALISM* BOOK IV 124-27 (Jonathan Riley ed., Oxford Univ. Press 2008) (1848). See also Herman E. Daly, *The World Dynamics of Economic Growth: The Economics of the Steady State*, 64 AM. ECON. REV. 15, 17 (1974) (“The technocratic

over time? This unsustainability of progress might seem rooted in climate change²⁵³ or in environmental matters generally. But we might equally see the major sustainability crisis as a matter of increasing global system instability and fragility, stemming from excessive interdependencies that limit risk reduction through diversification.²⁵⁴

Whatever we take the most crucial problem of sustainability to be, though, it is not clear that sustainability, whatever its costs, can be obtained only at the expense of progress across the board. Even John Stuart Mill's classic discussion of the economic "stationary state" makes this useful point: "a stationary condition of capital and population implies no stationary state of human improvement. There would be as much scope as ever for all kinds of mental culture, and moral and social progress"²⁵⁵

In its contemporary forms, sustainability thus does not seem to be necessarily opposed to progress in general. Consider more particularly what has been put forward as seven prominent themes commonly endorsed by theorists of sustainability: stewardship, respect for limits, interdependence, economic restructuring, fair distribution, intergenerational perspective, and nature as model or teacher.²⁵⁶ Each of these themes could certainly be compatible with responsible economic and other forms of progress. Respect for limits can take the form of responsible limits on growth rates and methods. Economic progress can presumably take place on the basis of fair initial

project of redesigning the world . . . so as to allow for indefinite economic growth is a bit of hubris that has received the insufficiently pejorative label of 'growth mania.'"). We note as well that population growth rates at or below levels of demographic sustainability may bring certain problems of adjustment, conflict, and instability. *See, e.g.,* Neil Howe & Richard Jackson, *The World Won't Be Aging Gracefully, Just the Opposite*, THE WASH. POST (Jan. 4, 2009), www.washingtonpost.com/wp-dyn/content/article/2009/01/02/AR2009010202231.html.

253. *See, e.g.,* Jedediah Purdy, *Climate Change and the Limits of the Possible*, 18 DUKE ENVTL. L. & POL'Y F. 289, 289 (2008).

254. *See* Robert Costanza, Lisa J. Graumlich & Will Steffen, *Lessons from Integrating the History of Humans and the Rest of Nature*, in SUSTAINABILITY OR COLLAPSE 3, 3 (Robert Costanza, Lisa J. Graumlich & Will Steffen eds., 2007). More broadly, compare the alternative futures (Heaven, Hell, and Prevail) presented in JOEL GARREAU, RADICAL EVOLUTION 130, 184, 224 (2005). Sustainability and long-term progress rates are generally a reflection of current savings and investment rates, as well as a low, if not zero, social discount rate. For discussion, see Tyler Cowen, *Caring About the Distant Future: Why It Matters and What It Means*, 75 U. CHI. L. REV. 5, 40 (2007).

255. MILL, *supra* note 252, at 129. Here, we assume the idea of a genuinely stationary state economy to itself be tenable. More generally, there seems a real kinship between sustainability and the long-term time horizons conducive to genuine progress over time, as opposed to a cultural focus on direct short-term benefits, with longer-term indirect costs ignored, heavily discounted, rendered invisible and untraceable, or pushed even further into the future on one rationale or another. For general discussion, see R. George Wright, *The Interests of Posterity in the Constitutional Scheme*, 59 U. CIN. L. REV. 113 (1990).

256. *See* EDWARD, *supra* note 252, at 128.

distributions. The sustainability theme of nature as a model or teacher could actually be said to guide not only Enlightenment science, but much of the Enlightenment itself.²⁵⁷

The seven sustainability themes outlined above actually amount to basic individual or civic virtues, or elements of human perfectionism, and are variously promotable through formal education.²⁵⁸ One of the leading contemporary philosophers of sustainability, Lisa H. Newton, makes a similar point. Professor Newton sees the crucial values underlying sustainability as including personal integrity, fidelity, community, humility, stewardship, voluntary simplicity, responsibility and accountability, and the four classic virtues²⁵⁹ of wisdom, courage, temperance, and justice.²⁶⁰ Each of these values is appropriately promotable, to greater or lesser degree, through different systems of formal education, in curricula, including one degree of focus or another on the basic virtues, perfectionism, and cultural progress. Finally, if we add the desire among sustainability theorists for responsible economic growth and development in the global south,²⁶¹ any real opposition between sustainability and genuine progress becomes even further blurred.

VII. CONCLUSION: EDUCATION LAW AS RIGHTS-CENTERED AND AS THE PURSUIT OF WORTHY VALUES AND GOALS: THE EXAMPLE OF *HORNE V. FLORES*

We have seen that talk of rights dominates the landscape of education law and policy.²⁶² We have no desire to radically overthrow this domination of rights discourse in education law. But it is both workable and desirable that the law of education aim at certain worthy values and goals that are not reducible to, or most easily expressed in, the language of rights. Despite unavoidable controversies of definition and substance, we have suggested above a systematic supplementation of rights-talk in the law. In particular, a conscientious concern in the law for the most attractive forms of education to basic personal and civic virtue,²⁶³ to perfectionist self-realization,²⁶⁴ and more broadly, to the promotion of genuine cultural progress over time²⁶⁵

257. See *supra* notes 203-211 and accompanying text.

258. See *supra* Parts III & IV.

259. See *supra* Parts III & IV and in particular JOSEPH PIEPER, *THE FOUR CARDINAL VIRTUES* (1966).

260. See LISA H. NEWTON, *ETHICS AND SUSTAINABILITY: SUSTAINABLE DEVELOPMENT AND THE MORAL LIFE* 3 (2003).

261. See SIMON DRESNER, *THE PRINCIPLES OF SUSTAINABILITY* 69 (2d ed. 2008).

262. See *supra* notes 1-5 and accompanying text.

263. See *supra* Part IV.

264. See *supra* Part V.

265. See *supra* Part VI.

seems well-advised. These more value- or goal-oriented elements of educational law and policy can and should be pursued consistent with, and supportive of, crucial forms of the broad liberal values of liberty and autonomy, equality, dignity, and community.²⁶⁶

Common sense suggests that if we are concerned about any such matters as student achievement,²⁶⁷ student study effort,²⁶⁸ or student civic knowledge and engagement,²⁶⁹ an exclusive focus on rights and their enforcement will be poorly adapted to the nature of the problem. For one thing, rights can generally be exercised, or not, at the sheer discretion of the right-holder.²⁷⁰ A competent student might simply waive or fail to claim the right, to such assistance as might be necessary to fulfill the right in question. It is technically possible to say that the citizenry as a whole has an enforceable legal right that some or all public school students reach some level of achievement, study with effort, or genuinely care to some specified degree about civic matters. However, to talk here in terms of enforceable rights grossly distorts the situation²⁷¹ and distracts us from the plain fact that in such cases, we are really aiming at some sort of overall sound goal or some valuable state of affairs.

Any talk of the basic personal and civic virtues of perfectionism, and of cultural progress is bound to leave some persons dissatisfied. Even the most benign ideas of cultural progress, in particular, provoke skepticism in certain quarters. Some have lost faith not merely in defective ideas of progress, but in the very idea of progress itself.²⁷² These critiques raise broader concerns than can be addressed here, but that is itself part of the problem with general skepticism toward progress. Skepticism toward progress in general can rarely be confined merely to progress itself; such a broad skepticism tends to gradually encompass scientific values, Enlightenment values, the basic liberal values, and familiar understandings of

266. See *supra* the respective arguments throughout Parts IV-VI.

267. See *supra* notes 28-34 and accompanying text; see also the widely discussed recent contribution RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* (2011) (finding that a significant percentage of undergraduate students make little progress in developing several vital academic skills over the course of their time on campus).

268. See *supra* note 198 and the sources cited therein.

269. See *supra* notes 35-37 and accompanying text.

270. See the conceptual discussions in the authorities cited *supra* note 4; see also JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990). See generally *THEORIES OF RIGHTS* (Jeremy Waldron ed., 1984).

271. Imagine trying to enforce a collective or institutional right that at least some percentage of college students concentrate attentively on their homework for a specified number of hours per week; see Babcock & Marks, *supra* note 198.

272. See, e.g., the postmodern critique of the meta-narrative of progress, as discussed in BELL, *supra* note 251, at 301-03; DRESNER, *supra* note 261, at 158 (discussing the work of the sociologist Anthony Giddens).

broadly liberal rights and their meaning and underpinning as well.²⁷³ Such critiques can hardly discourage attention to cultural progress as a goal of education law, while at the same time leaving intact the basic logic of rights underpinning our current educational system.²⁷⁴

More positively, though, our cultural discourse still applauds forward-thinking, progressivism, and being ahead of one's time, as opposed to being "medieval" or wishing to "turn back the clock."²⁷⁵ And these phrases are not just linguistic holdovers. As Charles Taylor has noted, "So deeply has the narrative of human progress become embedded in our world that it would indeed be a frightening day in which all faith in it was lost."²⁷⁶ The problems of public education—including that of gross and chronic underfunding for the sake of skewed priorities—are hardly new.²⁷⁷ But as the economic historian David Landes has concluded, "When all is said and done, the one and best cause for hope is the increase of knowledge and continued material achievement."²⁷⁸

As we have seen,²⁷⁹ the significant education law cases tend to focus in great detail on rights of one sort or another. In these cases, rights are proposed or denied, asserted or rejected, defined or redefined, recognized and acknowledged, limited or expanded, implemented or left judicially unenforced, or given one degree of priority or another. These sorts of rights-oriented activities are typically central to education case law adjudication.

We have sought herein to shift the focus, to some degree, toward value-oriented or goal-oriented rather than purely rights-oriented legal concerns. Some deserved emphasis therefore falls herein on the basic, relatively uncontroversial personal and civic values, on certain forms of developmental perfectionism, and on cultural progress over time, construed so as to promote valuable forms of the basic broadly liberal values.

While the major education law cases tend, understandably, to focus on rights, the more value- or goal-oriented concerns are often at least latently

273. See, e.g., BELL, *supra* note 251, at 301; PHILIP KITCHER, *THE LIVES TO COME: THE GENETIC REVOLUTION AND HUMAN POSSIBILITIES* 20 (1996) (asking, rhetorically, "[w]ill scientific self understanding inevitably cheapen our lives?"); ANTHONY O'HEAR, *AFTER PROGRESS: FINDING THE OLD WAY FORWARD* 161 (1999) (arguing that with the demise of the idea of progress goes any depth of meaning; and in large measure, the logic and meaning of "[h]uman dignity, freedom, and even reason," with humans being reduced to "survival machines," generated by chance and eking out a brief and unremarkable existence).

274. See *supra* notes 1-5 and accompanying text.

275. See CHARLES TAYLOR, *A SECULAR AGE* 717 (2007).

276. *Id.*

277. See Immanuel Kant, *Idea For a Universal History with a Cosmopolitan Intent*, in *BASIC WRITINGS OF KANT* 118, 130 (Carl J. Friedrich trans., Allen W. Wood ed., New York: The Modern Library 2001) (1784).

278. Landes, *supra* note 202, at 565.

279. See the various cases and other authorities cited *supra* note 1.

present within the cases, and they sometimes play an important if not always expressly articulated role. It would be an odd and grossly dysfunctional legal culture in which virtues, perfectionism, and progress played no actual role, either acknowledged or unacknowledged, and in which rights and rights-limitations did all the work.

The submerged but meaningful role of the value- and goal-oriented considerations can be seen, for example, in the protracted litigation culminating in *Horne v. Flores*.²⁸⁰ In a sense, *Horne* is a language-based educational opportunity case that is all about the definition, scope, implementation, and enforcement of rights under two prominent federal education statutes. These statutes are, respectively, the Equal Educational Opportunity Act of 1974 (EEOA)²⁸¹ and the No Child Left Behind Act (NCLBA) of 2001.²⁸² Under the EEOA statute in particular, no state can “deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”²⁸³ The EEOA is thus literally about rights.

Under the general educational circumstances of the *Horne* case, the courts have devised a three-part test for EEOA compliance.²⁸⁴ The three parts are formulated at a general level, and essentially require: (1) that the state in question adopt merely some relevant educational theory; (2) that the state adopt educational programs reasonably calculated to implement the selected educational theory; and (3) that the state show, after an appropriate time, that the educational programs implemented have been sufficiently successful in practice, in the sense of sufficiently overcoming the language barriers at issue in the case.²⁸⁵ Funding levels for the educational programs involved must be merely “rationally related”²⁸⁶ to any actually necessary level of funding.

280. See *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009).

281. Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, 88 Stat. 514, (codified as amended at 20 U.S.C.A. §§ 1701-58 (West 2008)); see also Michael A. Rosenhouse, Annotation, *Construction and Application of Equal Educational Opportunities Act (EEOA)*, 38 A.L.R. FED.2d 201 (2009); Jessica R. Berneyi, Note, “Appropriate Action,” *Inappropriately Defined: Amending the Equal Educational Opportunities Act of 1974*, 65 WASH. & LEE L. REV. 639 (2008).

282. 20 U.S.C.A. § 6301 (West 2008).

283. 20 U.S.C.A. § 1703(f) (West 2009).

284. See *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981); see also *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1041-42 (7th Cir. 1987).

285. See *Castaneda*, 648 F.2d at 1009-10.

286. See *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1239 (D. Ariz. 1999). This is already an oddly undemanding sense of “equal opportunity.”

We need not here be concerned with the history, circumstances, or even the technically complex outcome in the *Horne* case. Our focus is instead on the underlying nature of the case as illustrating our basic thesis. And indeed, on the merits, the *Horne* case is apparently all about rights, the scope of rights, and their enforcement. But thinking of *Horne* and similar cases solely in terms of rights obscures certain important goals and values, and is even distortive of the underlying statutes and the broader context.

We can say it is uncontroversial that some statutory rights that seem formally similar on their face can actually be very different in their practically legal character. The individual student's rights under the EEOA, for example, have been held to be judicially enforceable through a private right of action.²⁸⁷ The NCLBA is intended, apparently similarly, to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education"²⁸⁸ But despite, or because of, the NCLBA's enforcement provisions,²⁸⁹ the NCLBA has been held, unlike the EEOA, to create no private right of action.²⁹⁰

A bit more controversially, we can point out that the language-based educational opportunity rights at stake in *Horne*, as judicially construed, are actually rather odd and nonintuitive. They tend not to amount to rights at the level of genuine achievement, or substantive fulfillment, at least at the statutorily advertised level. They also do not seem to actually require genuine equality of educational opportunity in a broad and meaningful respect. While enforcement can indeed take the form of an individual private right of action, the enforceable rights seem to refer to aggregate numbers of students. At the bottom, the crucial right in question is roughly that the state or other defendants have vaguely made some logically organized and minimally acceptable effort against certain barriers to educational opportunity. Under the EEOA and its interpretive case law, the state need not provide genuinely equal educational opportunity with respect to language, but must merely take "appropriate action"²⁹¹ along those lines, which may be interpreted to involve merely "reasonable"²⁹² funding levels, which in turn may

287. See *Flores v. Arizona*, 516 F.3d 1140, 1146 n.2 (9th Cir. 2008), *rev'd sub nom. Horne v. Flores*, 129 S. Ct. 2579 (2009) (relating mainly on injunction issues); see also *Horne v. Flores*, 129 U.S. 2579 (2009); *Castaneda*, 648 F.2d at 1009; *Flores v. Arizona*, 48 F. Supp. 2d 937, 940 (D. Ariz. 1999) (applying the EEOA express private right of action provision, 20 U.S.C.A. § 1706).

288. *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 200 (3d Cir. 2008).

289. See *id.* at 202.

290. See *id.* at 212-13; *ACORN v. NYC Dep't of Educ.*, 269 F. Supp. 2d 338, 344-46 (S.D.N.Y. 2003), and most recently *Horne*, 129 S. Ct. at 2598 n.6.

291. See 20 U.S.C.A. § 1703(f) (quoted in *Flores v. Arizona*, 516 F.3d at 1145).

292. See *Castaneda*, 648 F.2d at 1010; *Flores v. Arizona*, 516 F.3d at 1146.

be further interpreted as an amount that is merely "rationally related"²⁹³ to the amount actually needed to fulfill the formally specified right. The statute's rhetorical high-mindedness becomes, in practice, largely a matter of vagueness and subjectivity, particularly at the judicial level.

All of this is expressly formulated in terms of rights. But it seems clear that the overall statutory and judicial scheme, including both the EEOA and the NCLBA, draws upon, and cannot be realistically understood apart from, the idea of important social goals, values, and public policies. Underlying and informing these statutes is a general vision of gradual progress in collectively fulfilling the academic potential of non-native English speaking students, and of an enhanced meaningfulness of their educational experience. These sorts of visions plainly cannot be fully cashed out in terms of rights and the enforcement or denial of specific rights.

In this particular case, the idea of the laws broadly promoting the basic narrowly personal virtues²⁹⁴ may seem irrelevant. But it is hardly unreasonable to think of promoting distinctively civic virtues²⁹⁵ and civic competencies through the overall statutory scheme in *Horne*. Nor does it seem distortive to think of that statutory scheme as promoting what we have referred to as perfectionist self-realization.²⁹⁶ Finally, it seems entirely clear that the EEOA and the NCLBA, as interpreted, aim at the goal of promoting cultural progress,²⁹⁷ in one form or another, over time. These key federal education statutes are, despite all appearances, really a matter of the promotion of basic civic virtues, egalitarian perfectionism, and long-term cultural progress as much as of rights.

Of course, there may still be some good faith debate over, say, the relative importance of specific program funding levels, among other factors, in promoting English language learning.²⁹⁸ This is presumably why the case law permits schools to adopt any relevant educational theory, however experimental, with some degree of expert endorsement.²⁹⁹ To the degree to which the experts differ among themselves on how to best enhance educational opportunity, the value of talking in terms of rigorously enforceable individual rights at the level of program methodology may well be limited.

293. See *Flores v. Arizona*, 516 F.3d at 1148, 1149; see also *Horne*, 129 S. Ct. at 2603.

294. See *supra* Part IV.

295. See, e.g., *supra* notes 116-17 and accompanying text.

296. See *supra* Part V.

297. See *supra* Part VI.

298. See, e.g., *Lau v. Nichols*, 414 U.S. 563, 564-65 (1974) (emphasizing the openness of the range of alternative programs potentially employable in reducing inequalities of educational opportunity).

299. See *Castaneda*, 648 F.2d at 1009; *Flores v. Arizona*, 516 F.3d at 1146; see also *Horne*, 129 S. Ct. at 2603-04.

We can still talk of rights even in extreme situations, in which implementation of the right is difficult or unlikely,³⁰⁰ or simply judicially unavailable.³⁰¹ And there is nothing about a standard of reasonableness itself that rules out its incorporation into the statement of an enforceable legal right.³⁰² One can certainly have a right, for example, that someone else exercise reasonable care,³⁰³ or perhaps make some reasonable efforts toward achieving some goal. But as we have suggested,³⁰⁴ the broad social goals underlying educational law and policy with regard to non-native English speakers are complex, multidimensional, and not in all respects best thought of under the rubric of rights. In this case, a vision of gradual collective progress in particular gives meaning to the scope and limits of the educational rights in question. And in this, the *Horne* case is actually rather typical.

300. As we might, for some purposes, wish to talk of an international legal right against a completed or ongoing campaign of genocide. See, e.g., MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS 3-4 (2007) (citing numerous recent instances and “the two-volume *Encyclopedia of Genocide*”).

301. As in the case of any individual private right of action under the NCLBA. See *supra* notes 288-90 and accompanying text.

302. See, e.g., Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2030-31 (2007) (discussing rights-theorists regarding the tort negligence standard).

303. See *id.*

304. See *supra* notes 294-97 and accompanying text.

